122 Box 47 - JGR/Recess Appointments (9) – Roberts, John G.: Files SERIES I: Subject File

certificate was obtained under a mistake of law and such a certificate "must be regarded as having been obtained 'illegally' within the meaning of 8 U.S.C. 1453 [sec. 342 of the Immigration and Nationality Act]."

Assuming that for present purposes the illegality ground of section 342 has the broad scope urged by the State Department, as to which there is doubt,[5] it does not follow that cancellation proceedings must be commenced. The statute places no mandatory obligation upon the Attorney General to institute cancellation proceedings, but rather empowers him to proceed in the exercise of a sound discretion. It is my belief that no proceeding should be instituted where the equities of the case are appealing, and there is a substantial doubt as to whether legal error was committed in issuing the certificate.

Mr. Flegenheimer is a man of considerable years, having passed his 69th birthday. For more than 17 years the immigration authorities have recognized him as a citizen of the United States. In 1952, upon proof satisfactory to the Commissioner of Immigration and Naturalization, who dealt with the legal questions involved *in extenso*, a certificate of citizenship was duly issued. Seven years later it is sought to cancel the certificate on the sole ground that the Commissioner erred as a matter of law. It is no answer to say, as the Department of State does, that cancellation of the certificate affects only the document and not the citizenship status of the person involved, and that Mr. Flegenheimer will be free to seek a judicial determination of his citizenship. The time to assert this was in 1952 and not now. It is my judgment that

[5] The operative language of sec. 342 is similar to that provided for denaturalization by the earlier statutes, namely, sec. 15 of the act of June 29, 1906, *supra*, and its successor, sec. 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U.S.C. (1946 ed.) 738. Under sec. 340 of the Immigration and Nationality Act of 1952, *supra*, illegality alone was removed as a ground for denaturalization. The legislative history indicates that the change was deemed desirable because of the confusion which had resulted from the failure of the courts to distinguish between fraudulent and illegal naturalizations. S. Rept. 1515, 81st Cong., 2d sess., 755, 760–765, 769. It is not evident why a like change was not made with respect to sec. 342.

Whether an erroneous determination of the nature here asserted would have amounted to illegality within the scope of the earlier denaturalization statutes is not clear. Compare *United States* v. *Richmond*, 17 F. 2d 28 (C.A. 3, 1927), and *United States* v. *Srednik*, 19 F. 2d 71 (C.A. 3, 1927), with such cases as *Maney* v. *United States*, 278 U.S. 17; *United States* v. *Ginsberg*, 243 U.S. 472, and *Nowak* v. *United States*, 356 U.S. 660. See also Comment, 51 Mich. L. Rev. 881, 884 (1953).

in the circumstances here present, Mr. Flegenheimer should not be compelled to resort to the courts. This conclusion takes into account not only the element of fairness but also the fact that the legal error asserted is itself a doubtful matter.

The Immigration and Naturalization Service defends its determination as correct. The Department of State takes a contrary position. Which of the opposing positions is correct presents complex issues. I am by no means convinced that the Service is in error. Absent that conviction it does not seem that a cancellation proceeding should be instituted, even should the power exist. It is my decision that such a proceeding should not be instituted in this case, and you are advised accordingly.

Sincerely,

WILLIAM P. ROGERS.

RECESS APPOINTMENTS

The President is authorized to make recess appointments to fill vacancies which occurred while the Senate was in session.

The President is authorized to make recess appointments during the temporary adjournment of the Senate from July 3 to August 8, 1960.

The reconvening of the Senate on August 8, 1960, is not to be regarded as the "next Session" of the Senate within the meaning of Article II, section 2, clause 3 of the Constitution, but as the continuation of the second session of the 86th Congress. The commissions of the officers appointed during this adjournment therefore will continue until the end of that session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress.

The adjournment of the Senate on July 3, 1960, constituted the "termination of the session of the Senate" within the meaning of 5 U.S.C. 56, so that persons whose nominations were pending before the Senate on that day and who receive recess appointments during the period of adjournment are entitled to the salaries attached to their offices, provided that the other conditions of 5 U.S.C. 56 are met; and this right will not be terminated by any temporary or final adjournment of the second session of the 86th Congress.

The terminal proviso of 5 U.S.C. 56 may require that the President submit to the Senate not later than forty days after it reconvenes on August 8, 1960, the nominations of those officers who, during the recess of the Senate, received appointments to fill vacancies which existed while the Senate was in session.

JULY 14, 1960.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor to comply with

your oral request for my opinion on several questions relating to your power under the Constitution to make what are commonly designated as recess appointments.

On July 3, 1960, the Senate adopted Senate Concurrent Resolution 112, 86th Cong., 2d sess., which reads:

"That when the two Houses shall adjourn on Sunday, July 3, 1960, the Senate shall stand adjourned until 12 o'clock noon on Monday, August 8, 1960, and the House of Representatives shall stand adjourned until 12 o'clock noon on Monday, August 15, 1960." (106 Cong. Rec. (Daily Ed., July 5, 1960), p. 14690.)

At the same time, the Senate agreed to a resolution providing:

"* * * That notwithstanding the adjournment of the Senate under Senate Concurrent Resolution 112, as amended, and the provisions of rule XXXVIII of the Standing Rules of the Senate, the status quo of nominations now pending and not finally acted upon at the time of taking such adjournment shall be preserved." [1]

The questions now presented are, first, whether you are authorized to make appointments pursuant to Article II, section 2, clause 3 of the Constitution, during the adjournment of the Senate from July 3 to August 8, 1960, in particular whether you may appoint to vacancies, existing at the time when the Senate was in session, those persons whom you had nominated and whose nominations were pending and not finally acted upon at the time when the Senate adjourned; second, when the commissions granted pursuant to such appointments will expire; third, whether you should submit to the Senate—when it reconvenes on August 8, 1960, or at some later time—for its advice and consent, the nominations of those persons who had received appointments during the adjournment of the Senate, especially of those whose nominations were pending and not finally acted upon at the time of the adjournment on July 3, 1960; and, finally, whether and how long the persons receiving such appointments may be paid pursuant to the provisions of 5 U.S.C.

[1] Rule XXXVIII of the Standing Rules of the Senate provides in pertinent part: "6. * * * if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."

56. For the reasons set forth in detail, I conclude, first, that you have the power to make appointments during this adjournment of the Senate, and that this power extends to vacancies which existed at the time the Senate was in session and to persons whose nominations were pending but not finally acted upon when the Senate adjourned on July 3, 1960; second, that the commissions of the persons so appointed will expire at the end of the session of the Senate following the adjournment *sine die* of the second session of the 86th Congress, presumably, the end of the first session of the 87th Congress; third, that it would be advisable to submit to the Senate, when it reconvenes at the end of the adjournment, nominations for all persons who received appointments between July 3 and August 8, 1960; and, finally, that, provided compliance is made with the provisions of 5 U.S.C. 56, any such appointee can be paid out of the Treasury for the duration of his constitutional term or until the Senate has voted not to confirm his nomination.

I

Article II, section 2, clause 3 of the Constitution provides:

"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

It has been settled by a long and unanimous line of opinions of the Attorneys General concurred in by the courts that the President's power to make such appointments is not limited to those which "happen to occur" during the recess of the Senate but that it extends to those which "happen to exist" during that period; hence, that the President has the constitutional power to fill vacancies regardless of the time when they first arose. 1 Op. 631 (1823); 2 Op. 525 (1832); 3 Op. 673 (1841); 7 Op. 186 (1855); 10 Op. 356 (1862); 12 Op. 32 (1866); 12 Op. 455 (1868); 14 Op. 562 (1875); 15 Op. 207 (1877); 16 Op. 522 (1880); 16 Op. 538 (1880); 17 Op. 530 (1883); 18 Op. 28 (1884); 18 Op. 29 (1884); 19 Op. 261 (1889); 26 Op. 234 (1907); 30 Op. 314 (1914); 33 Op. 20, 22–23 (1921); see also *In Re Farrow*, 3 Fed. 112 (C.C.N.D. Ga., 1880), and the opinion of Mr. Justice Woods, sitting as Circuit Justice, in *In Re Yancey*, 28 Fed. 445, 450 (C.C.W.D. Tenn., 1886).

The Congress, too, recognizes the President's power to make appointments during a recess of the Senate to fill a vacancy which existed while the Senate was in session.[2] R.S. 1761, 5 U.S.C. 56, which originally prohibited the payment of appropriated funds as salary to a person who received a recess appointment if the vacancy existed while the Senate was in session implicitly assumed that the power existed, but sought to render it ineffective by prohibiting the payment of the salary to the person so appointed.[3] In 1940, however, the Congress amended R.S. 1761, 5 U.S.C. 56 (act of July 11, 1940, c. 580, 54 Stat. 751), and permitted the payment of salaries to certain classes of recess appointees even where the vacancies occurred while the Senate was in session.[4] In view of this congressional acquiescence, you have, without any doubt, the constitutional power to make recess appointments to fill any vacancies which existed while the Senate was in session.

Next, I reach the question of whether the adjournment of the Senate, pursuant to Senate Concurrent Resolution 112 of July 3, 1960, from that day to August 8, 1960, is a "recess of the Senate" within the meaning of Article II, section 2, clause 3 of the Constitution. In other words, does the word "recess" relate only to a formal termination of a session of the Senate, or does it refer as well to a temporary adjournment of the Senate, protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations? It is my opinion, which finds its support in executive as well as in legislative and judicial authority, that the latter interpretation is the correct one.

In 1921, the Attorney General ruled that the President has the power to make recess appointments during an adjournment of the Senate for four weeks. 33 Op. 20(1921). In his opinion, the test for the determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e.,

[2] See, *e.g.*, 52 Cong. Rec. 1369–1370 (1915); 67 Cong. Rec. 262–264 (1925).

[3] Cf. the memorandum submitted by Senator Butler on March 16, 1925, 67 Cong. Rec. 263, 264 (1925).

[4] For an analysis of 5 U.S.C. 56, see II, *infra*. The legislative history of the 1940 amendment of 5 U.S.C. 56 does not contain any suggestion that the President lacks the power under the Constitution to make recess appointments when the vacancies existed while the Senate was in session. Cf. S. Rept. 1079, 76th Cong., 1st sess., and H. Rept. 2646, 76th Cong., 3d sess.

whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations. Relying on the classic expositions of Attorneys General Wirt and Stanbery in 1 Op. 631(1823) and 12 Op. 32(1866), the Attorney General explained the purposes the President's recess appointment power is designed to serve: *viz.*, to enable the President, at a time when the advice and consent of the Senate cannot be obtained immediately, to fill those vacancies which, in the public interest, may not be left open for any protracted period. He pointed out that the existence of a vacancy is no less adverse to the public interest because it occurs after a temporary rather than after a final adjournment of a session of the Congress, and "could not bring himself to believe that the framers of the Constitution ever intended" that the President's essential power to make recess appointments could be nullified because the Senate chose to adjourn to a specified day, rather than *sine die* (33 Op. 20, 23 (1921)).

The opinion, however, relied not only on earlier opinions of the Attorneys General; it was amply supported by judicial and legislative authority. In *Gould* v. *United States*, 19 C. Cls. 593, 595 (1884), the Court of Claims had held that the President possessed the power to make recess appointments during a temporary adjournment of the Senate lasting from July 20 to November 21, 1867. The Attorney General, furthermore, relied heavily on a "most significant" report of the Senate Committee on the Judiciary, dated March 2, 1905 (S. Rept. 4389, 58th Cong., 3d sess.; 39 Cong. Rec. 3823–3824 (1905)). This report, construing the very constitutional clause here involved, interprets the term "recess" as "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it cannot receive communications from the President or participate as a body in making appointments."

The opinion therefore concluded that the adjournment of the Congress from August 24 to September 21, 1921, a period shorter than the present recess, constituted a recess

648-815 O-64—32

of the Senate during which the President could fill vacancies under Article II, section 2, clause 3 of the Constitution.[5]

I fully agree with the reasoning and with the conclusions reached in that opinion. Moreover, this ruling since has been buttressed by a decision of the Comptroller General, and by the judgment of the Supreme Court in an analogous field. The decision of the Comptroller General (28 Comp. Gen. 30 (1948)) arose in the following circumstances:

In 1948, during the second session of the 80th Congress, President Truman submitted to the Senate the nominations of three judges. When the Senate, on June 20, 1948, adjourned to December 31, 1948, unless sooner called back into session by the congressional leadership, it had not acted on those nominations. On June 22, 1948, the President issued recess appointments to the three judges.[6] Upon inquiry from the Director of the Administrative Office of the United States Courts as to whether these judges could be paid, the Comptroller General ruled, largely in reliance on 33 Op. A. G. 20,[7] that an extended adjournment of the Senate is a "recess" in the constitutional sense, during which the President may fill vacancies. Specifically, the Comptroller General said (28 Comp. Gen. 30, at 34 (1948)):

"What is a 'recess' within the meaning of that provision [Art II, section 2, clause 3 of the Constitution]? Is it restricted to the interval between the final adjournment of one session of Congress and the commencement of the next succeeding session; or does it refer also to the period following an adjournment, within a session, to a specified date as here? It appears to be the accepted view—at least since an opinion of the Attorney General dated August 27, 1921, reported in 33 Op. Atty. Gen. 20—that a period such as last referred to is a recess during which an appointment properly may be made."

[5] In its final part (33 Op. 20, 24–25 (1921)), the opinion discussed the problems presented by the adjournment of the Senate for a few days, or for a short holiday. It concluded that the outcome hinged on the practical question of whether the Senate was present to receive communications from the President and that it was largely a matter of sound Presidential discretion to determine whether or not there was a real recess making it impossible for the Senate to give its advice and consent to executive appointments.

[6] These appointments, of course, would not have been made had not the Attorney General adhered to 33 Op. 20.

[7] The Comptroller General considered that opinion of the Attorney General so important that he incorporated it in its entirety as a part of his decision.

Considering that the Comptroller General is an officer in the legislative branch, and charged with the protection of the fiscal prerogatives of the Congress, his full concurrence in the position taken by the Attorney General in 33 Op. 20 is of signal significance.

Of equal importance is the decision of the Supreme Court in the *Pocket Veto* case, 279 U.S. 655 (1929), which, in a related field, uses the same argument as the Attorney General in 33 Op. 20: *viz.*, that the Presidential powers arising in the event of an adjournment of the Congress are to be determined, not by the form of the adjournment, but by the ability of the legislature to perform its functions. Article I, section 7, clause 2 of the Constitution provides:

"If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

The issue presented in the *Pocket Veto* case, *supra*, was whether an adjournment of the Senate from July 3 to November 10, 1926, was an adjournment of the Senate "preventing" the return of a bill which had originated in that body.

The Supreme Court, in analogy to the Attorney General in 33 Op. 20, ruled that the test is not whether an adjournment is a final one terminating a session, but "whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed."[8] Applying the reasoning of the *Pocket Veto* case, *supra*, to the situation at hand, it follows that you have the power to grant recess appointments during the present recess of the Senate, because that recess "prevents" it from advising and consenting to Executive nominations.

The commissions issued by you pursuant to Article II, section 2, clause 3 of the Constitution expire "at the End of their [the Senate's] next session." This "End of their next Ses-

[8] 279 U.S. 655, 680 (1929). *Wright* v. *United States*, 302 U.S. 583 (1938), held that a three-day adjournment of the Senate while the House of Representatives was in session, and during which a veto message of the President was accepted by the Secretary of the Senate, did not amount to an adjournment preventing the return of the bill. For a discussion of the Pocket Veto problem, see also 40 Op. A.G. 274 (1943).

sion" is not the end of the meeting of the Senate, beginning when the Senate returns from its adjournment on August 8, 1960, but the end of the session following the final adjournment of the second session of the 86th Congress, presumably, the first session of the 87th Congress.

The adjournment of the Congress on July 3, 1960, pursuant to Senate Concurrent Resolution 112 was not *sine die.* Hence, it merely had the effect of a temporary "dispersion" of the Congress. 20 Op. A.G. 503, 507 (1892). It did not, however, terminate the second session of the 86th Congress. 5 Hinds' *Precedents of the House of Representatives,* secs. 6676, 6677; 28 Comp. Gen. 30, 33–34 (1948); *Ashley* v. *Keith Oil Corporation,* 7 F.R.D. 589 (D.C. Mass., 1947). Hence, when the Congress reconvenes in August it will not begin a new session but merely continue the session which began on January 6, 1960. *Ashley* v. *Keith Oil Corporation, supra;* 28 Comp. Gen. 121, 123–126 (1948); see also *Memorandum of the Federal Law Section of the Library of Congress to the Senate Committee on the Judiciary,* dated November 5, 1947, 93 Cong. Rec. 10576–77. It follows that the "next session" referred to in Article II, section 2, clause 3 of the Constitution is the session following the adjournment *sine die* of the second session of the 86th Congress, i.e., either the first session of the 87th Congress or a special session called by the President following the final adjournment of the second session of the 86th Congress.[9]

This conclusion is fully supported by a ruling of the Comptroller General relating to the previously discussed recess appointments made by President Truman on June 22, 1948. After the second session of the 80th Congress had adjourned from June 20 to December 30, 1948, and a number of recess appointments had been granted, the President notified the Congress on July 15, 1948, to convene on July 26, 1948. Proclamation No. 2796, 13 F.R. 4057; 28 Comp. Gen. 121, 124 (1948). The Congress met accordingly, and again adjourned on August 7, 1948, until December 31, 1948

[9] A special session called by the President during a temporary adjournment of the second session of the 80th Congress would merely constitute a continuation of that session. *Ashley* v. *Keith Oil Corporation,* 7 F.R.D. 589, 591–592 (D.C. Mass., 1947) and the authorities there cited; *Memorandum of the Federal Law Section of the Library of Congress to the Senate Committee on the Judiciary,* dated November 5, 1947, 93 Cong. Rec. 10576–77 (1947); 28 Comp. Gen. 121, 125–126.

(28 Comp. Gen. 121, 122). The Comptroller General ruled "that the reconvening of the 80th Congress on July 26, 1948, pursuant to the President's proclamation of July 15, 1948 * * * merely constituted a continuation of the second session" (28 Comp. Gen., at 126); hence, that "the convening of the Congress during the period July 26 to August 7, 1948 * * * was not the 'next session of the Senate' within the meaning of Article II, section 2, clause 3 of the Constitution, and that Judge Tamm's commission to office did not expire on August 7, 1948, when the second session of the 80th Congress adjourned * * *" (28 Comp. Gen., at 127).[10]

This year the Congress will reconvene, not pursuant to your call, but according to its own adjournment resolution. In these circumstances, the return of the Congress in August clearly is a continuation of the second session of the 86th Congress and not the next session, the termination of which would cause the recess appointments to expire. Barring an adjournment *sine die* of the 86th Congress and the calling of a special session, the recess commissions granted during the present recess of the Senate will terminate at the end of the first session of the 87th Congress. Officers who serve at your pleasure, of course, may be removed by you at any time.

You also have inquired whether you should submit to the Senate, when it reconvenes in August, nominations for those persons to whom you have given recess appointments during this adjournment of the Senate, although their nominations were pending but not finally acted upon at the time the Senate adjourned. This question is so intimately tied up with the pay status of the recess appointees that I shall answer it in that context.

II

The circumstance that you have the power to make appointments during this adjournment of the Senate and that the commissions so granted—barring unforeseen circumstances—will last until the adjournment *sine die* of the first session of the 87th Congress, however, does not mean

[10] The Attorney General did not publish a formal opinion in connection with this incident. A press release issued by Attorney General Clark on August 11, 1948, and the files of this Department, however, indicate that he was in full agreement with that ruling.

necessarily that your appointees can be paid out of appropriated funds.[11] The Congress has limited severely the use of such moneys for the payment of the salaries of certain classes of recess appointees.

R.S. 1761, as amended by the act of July 11, 1940, c. 580, 54 Stat. 751, 5 U.S.C. 56,[12] provides:

"No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) of this section, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate."

The import of this complicated provision, briefly, is as follows: If the President makes a recess appointment to fill a vacancy which existed while the Senate was in session, the appointee may be paid prior to his confirmation by the Senate in three contingencies:

a. If the vacancy arose within thirty days prior to the termination of the session of the Senate;

b. If at the time of the termination of the session of the Senate a nomination for this office was pending before the Senate, except where the nominee is a person appointed during the preceding recess of the Senate;[13] or

[11] In this opinion I shall use the term "paid" in the sense of being paid out of appropriated funds in the regular course of business, i.e., prior to confirmation by the Senate, and without recourse to the Court of Claims.

[12] Hereafter usually referred to as 5 U.S.C. 56.

[13] 36 Comp. Gen. 444 (1956) interprets clause (b), in analogy to clause (c), as if it read: If at the time of the termination of the session of the Senate a nomination for this office was pending before the Senate, except where the person who receives the recess appointment is a person appointed during the preceding recess of the Senate.

c. If a nomination for the office was rejected by the Senate within thirty days prior to the termination of the session, except where the person who receives the recess appointment is the person whose nomination was rejected.

The terminal proviso of 5 U.S.C. 56 requires in addition that a nomination to fill a vacancy in those three contingencies must be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

The statute thus permits the payment of salaries to persons receiving recess appointments to vacancies, which existed while the Senate was in session, in three situations, all of which are predicated on "the termination of the session of the Senate." Here again, the question arises whether this term must be interpreted technically—limited to the final adjournment of a session—or whether it permits the payment of salaries to those who receive a recess appointment after a temporary adjournment of the Senate.

The Comptroller General has ruled that "the term 'termination of the session' [has] * * * been used by the Congress in the sense of *any adjournment*,[14] whether final or not, in contemplation of a recess covering a substantial period of time" (28 Comp. Gen. 30, 37). Considering that the Comptroller General is the officer primarily charged with the administration and enforcement of 5 U.S.C. 56, his interpretation of that statute is of great weight. Independent reexamination of the subject matter, moreover, causes me to concur fully in his conclusions based largely on the purposes which the act of July 11, 1940, 54 Stat. 751, amending 5 U.S.C. 56, was designed to accomplish.

Prior to the enactment of the 1940 amendment, 5 U.S.C. 56 provided that if a vacancy existed while the Senate was in session a person receiving a recess appointment to fill that vacancy could not be paid from the Treasury until he had been confirmed by the Senate. This statute caused serious hardship, especially when a vacancy occurred shortly before the Senate adjourned, or where a session terminated before the Senate had acted on nominations pending before it (H.

[14] Emphasis supplied.

Rept. 2646, 76th Cong., 3d sess.; see also letter from Attorney General Murphy to Senator Ashurst, dated July 14, 1939, S. Rept. 1079, 76th Cong., 1st sess., p. 2). The inability to pay recess appointees in those circumstances had the effect of either compelling the President to leave the vacancy unfilled until the next session of the Senate, or causing the appointee to undergo the financial sacrifice of having to serve, possibly for a considerable period of time, without knowing whether he could be paid (see letter of Attorney General Murphy to Senator Ashurst, *supra*).

The purpose of the 1940 amendment was "to render the existing prohibition on the payment of salaries more flexible" (H. Rept. 2646, 76th Cong., 3d sess., p. 1) and to alleviate the "serious injustice" caused by the law as it then stood (S. Rept. 1079, 76th Cong., 1st sess., p. 2). Thus, 5 U.S.C. 56, as it stands now, is a remedial statute designed to permit the immediate payment of recess appointees, provided the President complies in good faith with the statutory conditions.[15]

The "serious injustice" caused by the inability to pay a recess appointee, of course, is just as great and undesirable in the case where the appointment was made after a temporary recess of the Senate as where the commission had been granted after a final adjournment. To restrict the words "termination of the session" to a final adjournment, therefore, would be "inconsistent with the obvious purpose of the law" 28 Comp. Gen. 30, 37.

It follows that a person receiving a recess appointment during a prolonged adjournment of the Senate may be paid, if the conditions of 5 U.S.C. 56 initially have been met, i.e., if the vacancy arose within thirty days of the adjournment; or if a nomination was pending before the Senate at the time of the adjournment, except where the recess appointee has served under an earlier recess appointment; [16] or if the Senate had rejected a nomination within thirty days prior to its adjournment, except where the recess appointee is the person whose nomination had been rejected.

The recess appointee's right to be paid will continue throughout the constitutional term of his office, except for two contingencies: First, if the Senate should vote not to confirm

[15] For that reason, the Comptroller General consistently has interpreted the statute liberally; see, *e.g.*, 28 Comp. Gen. 30, 36–37; 238, 240–241; 36 Comp. Gen. 444, 446.

[16] Cf. n. 13, *supra*.

him, section 204 of the annual General Government Matters Appropriation Act, 1960 (July 8, 1959, 73 Stat. 166) would preclude the further payment of salary out of appropriated funds; second, the appointee's pay status may be cut off as the result of noncompliance with the terminal proviso of 5 U.S.C. 56, i.e., in the case of a failure to submit to the Senate a nomination to fill the vacancy within forty days after "the commencement of the next succeeding session of the Senate." The adjournment of the Senate after it reconvenes in August, however, will not jeopardize the recess appointee's right to be paid.[17]

III

When the Senate reconvenes in August 1960, you should submit to it nominations for all persons who received appointments during the adjournment of the Senate, including those whose nominations were pending but not finally acted upon when the Congress adjourned. This resubmission is desirable in order to advise the Senate of the fact that recess appointments have been made, and is probably required in order to protect the pay status of the recess appointees.

Ordinarily, when the Senate adjourns for more than thirty days all nominations pending and not finally acted upon at the time of the adjournment are returned to the President and may not be considered again unless resubmitted by the President (Rule XXXVIII(6) of the Standing Rules of the Senate). However, when the Senate adjourned on July 3, 1960, it resolved that—

"* * * the status quo of nominations now pending and not finally acted upon at the time of * * * adjournment shall be preserved." (106 Cong. Rec. (Daily Ed., July 5, 1960), p. 14690.)

The Senate thus has waived Rule XXXVIII(6), with the result that nominations pending before it on July 3, 1960, but not finally acted upon at that time, will not be returned to you. And, when the Senate reconvenes in August, those nominations will be before it, and may be considered in the stage in which they were at the time of adjournment. The resolution thus avoids much duplication of effort, especially in those instances where hearings already have been held on a nomination.

I do not read the resolution, in particular the statement

[17] These two points will be discussed in Part III, *infra*.

that the *status quo* of all pending nominations not finally acted upon shall be preserved, as purporting to freeze those nominations, and to prevent the President from giving recess appointments to those whose nominations were pending but not finally acted upon at the time of the adjournment of the Senate. Any attempt of the Senate to curtail the President's constitutional power to make recess appointments would raise the most serious constitutional questions. And where, as here, the resolution not only fails to reveal any such purpose, but rather obviously was designed to obviate needless work, I refuse to attribute to the Senate any intent to interfere with the President's constitutional powers and responsibilities.[18]

In spite of the suspension of Rule XXXVIII(6) of the Standing Rules of the Senate, I recommend strongly that when the Senate reconvenes in August you should submit to it new nominations for those persons whose nominations were pending on July 3, 1960, and who have received appointments during the adjournment of the Senate. The submission of the new nominations would not constitute a meaningless duplication of effort, nor jeopardize the pay status of the recess appointees. The failure to do so, however, may constitute a violation of the terminal proviso of 5 U.S.C. 56 and delay, if not entirely prevent, the payment of salaries to the appointees.

First. Nominations submitted to the Senate customarily indicate the circumstance, where applicable, that a nominee is serving under a recess appointment. The preadjournment nominations of those who thereafter received recess appointments, of course, do not contain that information. The Senate has a substantial interest in being advised of the fact that a nominee is serving under such an appointment. Such appointment fills the position temporarily, and confirmation

[18] The circumstance that the nominations remain pending before the Senate during its recess does not affect the pay status of the recess appointees. 5 U.S.C. 56 does not contain any prohibition against the payment of the salaries to appointees whose nominations are pending before the Senate after its adjournment. Clause (b), it is true, refers to the situation that a nomination *is pending* before the Senate at the time of the termination of the session of the Senate. There is, however, nothing in the spirit and the language of 5 U.S.C. 56 to the effect that clause (b) is inapplicable where this nomination *remains pending* following the termination of the session. Moreover, 5 U.S.C. 56 has been interpreted to the effect that the question of whether a person may be paid is to be determined as of the time of the adjournment of the Senate preceding the recess appointment and not as of a later time (28 Comp. Gen. 121, 127–129, and see the discussion of that part of the Comptroller General's ruling, *infra*).

therefore is no longer urgent. This may be an important consideration to the Senate when it returns for what is hoped to be a short session. On the other hand, if the Senate is strongly opposed to an appointee it may vote to deny confirmation, and thus, for all practical purposes force him to resign by cutting off his pay. The submission of a new nomination for a recess appointee after the return of the Senate, accordingly, serves a distinct purpose.

Second. The terminal proviso of 5 U.S.C. 56 requires the submission of the nomination of a person who received a recess appointment "to the Senate not later than forty days after the commencement of the next succeeding session of the Senate." Failure to comply with this proviso presumably results in the suspension of the appointee's right to be paid out of appropriated funds. While the reconvening of the Senate after a temporary adjournment is not the commencement of the next session of the Senate in the ordinary sense of that term, we have seen that 5 U.S.C. 56 uses those words in a nontechnical way. If the words "termination of a session" in clauses (a), (b), and (c) have been interpreted as including a temporary adjournment which does not terminate a session, it is likely that the words "commencement of the next succeeding session of the Senate" correspondingly refer to the reconvening of the Senate after any adjournment, regardless of whether, technically, it begins a new session. In these circumstances, prudence suggests that I base my advice on the assumption that 5 U.S.C. 56 may require the submission of new nominations when the Senate reconvenes in August.[19]

I do not believe that noncompliance with the terminal proviso of 5 U.S.C. 56 can be rested safely on the ground that nominations made prior to adjournment but not finally acted upon at that time are still pending before the Senate as the result of the suspension of Senate Rule XXXVIII(6). The statute does not contain an exception covering that con-

[19] Arguments, of course, can be made that the words "commencement of the next succeeding session of the Senate" should be given their traditional meaning. The circumstance that the terminal proviso gives the President forty days within which to submit the nomination to the Senate might support the conclusion that the proviso refers to the next regular session of the Senate because, as a matter of experience, adjourned sessions of the Senate rarely last forty days. If the Senate should adjourn within forty days after its return on August 8, 1960, and before the President has submitted the nomination, it could be argued, in analogy to Article I, section 7, clause 2 of the Constitution, that compliance with 5 U.S.C. 56 has been waived because it has been "prevented" by the adjournment of the Senate.

tingency.[20] It could be argued, of course, that a statute should not be construed so as to require the performance of a redundant ceremony. However, as we have shown, the information that a nominee is serving under a recess appointment may be of considerable interest to the Senate. In any event, I should hesitate to recommend for quasi-equitable reasons the omission of an express statutory requirement in an area as technical as the appointment and pay of Federal officers.

In weighing these conflicting considerations, it appears to me, on the one hand, that the submission of new nominations to the Senate does not constitute an intolerably heavy burden. Moreover, as I shall show presently, rulings of the Comptroller General—with which I fully agree—have established that compliance with the letter of the statute will not jeopardize the recess appointee's pay status. On the other hand, the failure to resubmit a nomination conceivably may result in the suspension of the appointee's pay. In these circumstances, I recommend that when the Senate reconvenes in August nominations should be submitted for all officials who received appointments during the adjournment of the Senate, including those whose nominations were pending before the Senate at the time of its adjournment on July 3, 1960.[21] As a matter of precaution, I urge that nominations be submitted again when the Senate commences a new session in the technical sense.

The recess appointees' pay status will not come to an end when the Senate adjourns after its August sitting. When the Senate concludes its session after reconvening in August, a situation will be presented which appears to fall within the exception to 5 U.S.C. 56, clause (b): The Senate then will have terminated a session, and at that time there will be pending before it the nomination of a person who had received an appointment during the preceding recess of the Senate. This raises the question of whether the pay rights of a recess appointee, whose appointment originally

[20] The terminal proviso to 5 U.S.C. 56 was inserted by the Senate Committee on the Judiciary in order to insure that the nomination "will be submitted in ample time for adequate consideration by any incoming session of the Senate." S. Rept. 1079, 76th Cong., 1st sess., p. 2.

[21] Considering that it is desirable to obtain the advice and consent of the Senate to a nomination at the earliest possible moment, my recommendation includes the submission of nominations for those who received recess appointments to vacancies which occurred after the adjournment of the Senate, although 5 U.S.C. 56 does not cover those appointments.

complied with the requirements of 5 U.S.C. 56, can be cut off by the circumstances existing at the time of the subsequent termination of a session of the Senate. The opinion of the Comptroller General in 28 Comp. Gen. 121 cogently demonstrates that this is not the case because the words "termination of the session of the Senate" in 5 U.S.C. 56 uniformly refer to the session immediately preceding the recess when the appointment was made, and not to any subsequent termination.

An analysis of 5 U.S.C. 56 shows that in clauses (a) and (c) the words "termination of the session of the Senate" unquestionably relate to the session immediately preceding the recess of the Senate during which the appointment was made and not to a later one. The Comptroller General inferred from this that "it would be wholly inconsistent to say that the phrase 'termination of the session' as used therein [clause (b)] had reference to other than the session preceding the recess when the appointment was made.[22] * * * In other words, the entire statute speaks as of the date of the recess appointment under which the claim to compensation arises." (28 Comp. Gen. 121, 128 (1948)) The Comptroller General, therefore, concluded that the right to compensation, once vested, does not become defeated by a subsequent adjournment. He realized that under his interpretation the words "termination of the session of the Senate" in 5 U.S.C. 56 refer to a different session than the words "End of their next Session" in Article II, section 2, clause 3 of the Constitution. He attributed this "apparent inconsistency" to the circumstance that the recess appointment provisions of the Constitution and of 5 U.S.C. 56 serve different purposes (28 Comp. Gen. 121, 129).

I fully agree with the conclusions of the Comptroller General reached on the basis of the statutory language. I believe, however, that this result may be supported by two additional, broader considerations. First, the purpose of the 1940 act amending 5 U.S.C. 56 was to eliminate the hardship and injustice resulting from the inability to pay recess appointees appointed to vacancies which existed while the Senate was in session, where the vacancies arose shortly be-

[22] The Comptroller General also explained that the statute uses the words "termination of *the* session" in the specific sense, hence, that it refers to the termination of a particular session, i.e., the one preceding the recess appointment "rather than to just any session" 28 Comp. Gen. 121, 128.

fore an adjournment of the Senate, or where a nomination was pending before the Senate, but where the Senate adjourned before acting on it. The purpose of the 1940 statute was to permit the payment of salaries out of appropriated funds in those cases. It would create a new instance of the very hardship which the statute was intended to alleviate, if the right to compensation, once accrued, could be cut off by subsequent events, such as the reconvening and subsequent adjournment of the Senate, and if a recess appointee thereafter were required to work without pay for the rest of his constitutional term, or until the Senate should confirm him. An interpretation of the statute, which gives rise to results so inconsistent with the purposes it is designed to serve, must be rejected.

Second, it is the basic policy of the United States that a person shall not work gratuitously for the Government, or be paid for such work by anyone other than the Government (31 U.S.C. 665(b); 18 U.S.C. 1914). It is well recognized that a person who is not paid cannot be expected to perform his work zealously, and that he may be subjected to a host of corrupting influences. A statute which provides that a person cannot be paid by the Treasury until the happening of a future event, therefore, must be strictly construed. Even less favored is an interpretation which would result in the defeasance of a right to be paid, once it has accrued. In the case of any ambiguity, a statute should be read so as to permit the current compensation for work performed for the United States.

I therefore conclude that an adjournment of the Senate during, or terminating, the second session of the 86th Congress will not affect the pay status of a person appointed during the current recess of the Senate, and whose appointment originally complied with the requirements of 5 U.S.C. 56.[23]

Respectfully,

LAWRENCE E. WALSH,
Acting Attorney General.

[23] A final caveat: A recess appointee filling a vacancy which existed while the Senate was in session, and who is not confirmed, when the Senate adjourns after it reconvenes in August, may not be given, out of a superabundance of caution, a second recess appointment. Such second appointment is unnecessary because his term runs until the end of the first session following the final adjournment of the second session of the 86th Congress; moreover, it might bring the appointee within the exception to 5 U.S.C. 56, clause (b) and, conceivably, result in the suspension of his salary. Cf. 28 Comp. Gen. 30, 37–38.

OLD SAN FRANCISCO MINT BUILDING—DISPOSITION AS SURPLUS PROPERTY

The authority of the General Services Administrator to dispose of the Old San Francisco Mint building by sale as surplus property is not limited by the provisions of section 7 of the act of August 27, 1935, added by the act of July 18, 1940 (c. 635, 54 Stat. 765, 40 U.S.C. 304a–2), that the General Services Administrator shall not "demolish" any building declared by him to be surplus to the needs of the Federal Government, if the Secretary of the Interior determines that such building is an historic structure of national significance.

The word "demolition" is not synonymous with the word "sale," and it is well settled that a legislative omission or failure to provide for contingencies, for which it might have been desirable to provide specifically, does not justify any addition to the language of a statute. Moreover, the legislative history of section 7 of the act of August 27, 1935, does not support any different construction.

July 18, 1960.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: You have advised me that the General Services Administration, which has custody and control of the San Francisco Mint building, considers the building to be excess to the needs of the Federal Government and proposes to dispose of it by sale in circumstances which indicate that a purchaser will demolish the building. The General Services Administration is proceeding under the authority provided by the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. 471, *et seq.* You request my opinion concerning the authority of the General Services Administration to dispose of the building as surplus property in view of your determination, formally conveyed to the Administrator of General Services in May 1957, that the San Francisco Mint building is an historic building of national significance and that it is your intention to designate it as an historic site within the meaning of the Historic Sites Act of August 21, 1935, c. 593, 49 Stat. 666, 16 U.S.C. 461–464.

Section 7 of the act of August 27, 1935, added by section 2 of the act of July 18, 1940, c. 635, 54 Stat. 764, 765, 40 U.S.C. 304a–2, authorizes the Administrator of General Services, upon a determination that such action will be to the best interest of the Government, "to demolish" any building declared surplus to its needs. Before proceeding with any

The amendments all deal with the portion of the House-passed bill which created section 35 of ANCSA. Basically, that section would have carried the impact of this legislation outside of the Cape Krusenstern National Monument. The amendments I have proposed would limit the impact of the bill to only Cape Krusenstern. I understand that this approach is acceptable to the House of Representatives and the bill passed by the Senate tonight should be enacted by the House immediately after the August recess.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Kansas.

The motion was agreed to.

SPECIAL GOLD MEDAL FOR GEORGE AND IRA GERSHWIN

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of House Joint Resolution 251, to provide for a special gold medal for George Gershwin and Ira Gershwin, reported out of the Banking Committee today.

The PRESIDING OFFICER. The joint resolution will be stated by title.

The legislative clerk read as follows:

A joint resolution (H.J. Res. 251) to provide that a special gold medal honoring George Gershwin be presented to his sister, Frances Gershwin Godowsky, and a special gold medal honoring Ira Gershwin be presented to his widow, Lenore Gershwin, and to provide for the production of bronze duplicates of such medals for sale to the public.

The PRESIDING OFFICER. Is there objection to the present consideration of the joint resolution?

There being no objection, the joint resolution (H.J. Res. 251) was considered, ordered to a third reading, read the third time, and passed.

The preamble was agreed to.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

RE-REFERRAL OF S. 1313

Mr. DOLE. Mr. President, I ask unanimous consent that the Judiciary Committee be discharged from further consideration of S. 1313, a bill to amend the Federal Trade Commission Act to allow certain actions by States attorneys general and it be referred to the Commerce Committee.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATUS QUO NOMINATIONS

Mr. DOLE. Mr. President, as in executive session, I ask unanimous consent that during the adjournment of the Senate over until September 9, 1985, that all the nominations pending in the Senate remain in the status quo, with the exception of the following: Rosalie Silberman, Charles A. Trabandt, James W. Spain, Winston Lord, Raymond D. Lett, Richard H. Francis, Ann Brunsdale, Helen Marie Taylor, William McGinnis, Sidney Lovett, Richard John Neuhaus, W. Bruce Weinrod, and John Norton Moore.

Mr. BYRD. Mr. President, reserving the right to object, and I will not object, the last four names, I do not have.

Mr. DOLE. And also William Bradford Reynolds.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

RECESS APPOINTMENTS

Mr. BYRD. Mr. President, statements by administration officials have recently appeared in the press which border on total disregard for constitutional principles. I refer specifically to statements pertaining to the Senate's responsibility to advise and consent in Presidential appointments, and the authority granted to the President for recess appointments.

On June 27, 1985, the Senate Judiciary Committee rejected the nomination of William Bradford Reynolds for the position of Associate Attorney General. On July 16, the Washington Post contained a report that administration officials were "considering the possibility of installing Reynolds" as Associate Attorney General "as a recess appointee after the Senate adjourns August 2, sources said."

Further discussing the possibility of a recess appointment for Mr. Reynolds, an article in the Washington Post the following Day, July 17, quoted an unnamed White House official as saying "The tail is not going to wag the dog on these nominations. That Committee has to understand who is the President of the United States * * *. We expect to get our people confirmed * * *."

Mr. President, I have no desire to lecture the White House on constitutional law. The President's lawyers know full well that the recess appointment clause which appears in the U.S. Constitution was not created as a political loophole to thwart the will of the Senate. Article III, section 2, provides that officers of the United States shall be appointed by the President "with the advice and consent of the Senate." That appointment process was initiated by this administration when Mr. Reynolds was nominated for the position of Associate Attorney General. The nomination was rejected by the Senate Judiciary Committee on June 27, 1985, by a vote of 8 to 10. To attempt now to circumvent that rejection by making a recess appointment of Mr. Reynolds to the same position during our August break would make a mockery of the Senate's role. It would be wholly inappropriate and unacceptable, and I have so informed the White House, on behalf of Senate Democrats, in my letter to the President of July 16.

The recess appointment clause appears in article III, section 2, of the U.S. Constitution. It provides that:

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Mr. President, when the Constitution was drafted, the framers recognized the practical realities of their time. Communications were slow and uncertain. Travel from one 18th century American city to another was measured in terms of days rather than hours. Accordingly, in order to make American Government effective, the framers allowed the President to make appointments during "the recess of the Senate." I stress the word "the." In the early days of this Republic, as now, there was a recess of the Senate between sessions.

The phrase "the recess"—again emphasizing the word "the"—should be borne in mind, and should be read in context of the entire clause which then states that the recess appointment "shall expire at the end of their next session." Read in that way, it seems to me that the recess appointment clause was included in the Constitution as a practical solution to filling essential Government positions in the horse and buggy age during the recess which occurred betwen the sessions of the Congress.

Mr. President, this is not the first time this administration has misinterpreted the purpose of the recess appointment power. During the 24-day recess for the Fourth of July holiday in 1984, 17 recess appointments were made. In several cases, those recess appointments avoided serious and probing debate by the Senate on controversial issues. And there was no evidence that the needs of the Government required any of those appointments to be made as recess appointments.

Last year I introduced a Senate resolution in an attempt to make it absolutely clear that the recess appointment clause should not be used by any administration to thwart the will of the Senate, to skirt the "advice and consent" clause of the Constitution, or to avoid potential controversy. My proposal was introduced toward the end of the last term of the Congress and was not processed before the Senate adjourned for the year.

Because this issue is so fundamental to maintaining the delicate balance of powers which was incorporated into our constitutional system, and in view of the recurrence of this problem in the context of the Reynolds nomination, I am introducing a resolution on the same subject again today.

My resolution expresses the sense of the Senate that the exercise of the power to make recess appointments should be confined to a formal termination of a session of the Senate, or to a recess of the Senate, protracted enough to prevent it from discharging

its constitutional function of advising and consenting to executive nominations. In addition, it expresses the sense of the Senate that the President should refrain from using his recess appointment powers unless there is a formal termination of a session of the Senate, or a recess that lasts longer than 30 days. Finally, my resolution expresses the sense of the Senate that a recess appointment should not be made of any individual whose nomination to the same office has been previously rejected by the Senate, or the appropriate Senate committee, during the same Presidential term.

By introducing this resolution, I am not suggesting that the President should never use his recess appointment power. Nor am I suggesting that there might never be a situation in which a recess appointment is necessary. In fact, I even recommended the use of the recess appointment power myself when an appointment was necessary to ensure that one of our important Government boards would have a quorum in order to continue to conduct its business.

However, the kinds of situations I have described today do not involve that kind of an emergency. The business of government, and the Department of Justice in particular, will, I am confident, function with efficiency during the month of August without a commissioned official serving in its No. 3 slot.

I am sure the administration is well aware of the practical purpose which was served by including the recess appointment clause in the Constitution. Introduction of this resolution is not intended to suggest that the issue is unclear. Senate Democrats have gone on record, separate and apart from this resolution, in their conclusion that Mr. Reynolds should not be a recess appointee. We went on record again this week in a letter to the President which expressed our views on the subject of recess appointments generally. However, I do believe the entire Senate should be on record in reinforcing our constitutional role with respect to Presidential appointments, and stating that we will not stand idly by and witness an erosion of our responsiblity and our duty under the law.

Mr. President, I ask unanimous consent that the text of my resolution, the two Washington Post articles, and my letters to the President, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

The cosponsors of the resolution are: Mr. Byrd (for himself), Mr. Bradley, Mr. Chiles, Mr. Lautenberg, Mr. Leahy, Mr. Melcher, Mr. Dodd, Mr. Mitchell, Mr. Ford, Mr. Matsunaga, Mr. DeConcini, Mr. Hart, Mr. Biden, Mr. Baucus, Mr. Eagleton, Mr. Bumpers, Mr. Exon, Mr. Johnston, Mr. Inouye, Mr. Levin, Mr. Nunn, Mr. Pell, Mr. Proxmire, Mr. Riegle, Mr. Sarbanes, Mr. Sasser, Mr. Zorinsky, Mr. Simon, Mr. Kerry, Mr. Hollings, Mr. Bentsen, Mr. Stennis, Mr. Bingaman, Mr. Rockefeller, Mr. Cranston, Mr. Kennedy, and Mr. Harkin.

S. RES. 213

Whereas, the United States Constitution in Article II, Section 2, Clause 2, vests in the Senate the power to give its advice and consent to presidential appointments,

Whereas, the Appointments Clause specifies the method clearly preferred by the Framers for the regular appointment of Officers of the United States,

Whereas, the Appointments Clause has been judicially determined to be an aspect of the principle of separation of powers woven into the United States Constitution (*Buckley v. Valeo*, 424 U.S. 1 (1976)),

Whereas, the reasons behind the Recess Appointment Clause, Article II, Section 2, Clause 3, like those supporting the pocket veto power, have been largely superseded by modern methods of instantaneous communication and the modern practice of Congress with respect to abbreviated intrasession adjournments (*Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)),

Whereas, the adherence to Appointment Clause procedures, unlike a recess appointment that thereafter may be rejected by the Senate, precludes subsequent challenges with respect to the appointee's rightful exercise of significant authority pursuant to the laws of the United States; Therefore be it

Resolved, That it is the sense of the Senate that—

(1) The exercise of the power to make recess appointments should be confined to a formal termination of a session of the Senate, or a recess of the Senate, protracted enough to prevent it from discharging its constitutional function of advising and consenting to executive nominations;

(2) As the President as well as the heads of Executive and military departments are authorized to detail officers of the United States to fill vacancies in offices at all levels of the Federal Government, Chapter 33, Title 5, United States Code, which details are valid for at least thirty days, no recess appointment should be made when the Senate stands adjourned or recessed within a session for a period of less than thirty days; and

(3) No recess appointment should be made of any person to any office—

(a) if such person has previously, during the same presidential term, been nominated for appointment to such office; and

(b) (1) the Senate has voted not to give its advice and consent to such appointment; or

(2) the appropriate committee of the Senate has voted not to report such nomination to the Senate.

[FROM THE WASHINGTON POST, JULY 17, 1985]

DEMOCRATS OPPOSE REYNOLDS PROMOTION: SENATORS WARN REAGAN AGAINST RECESS APPOINTMENT OF REJECTED JUSTICE DEPARTMENT NOMINEE

(BY HOWARD KURTZ AND JUAN WILLIAMS)

Senate Minority Leader Robert C. Byrd (D-W.VA.) urged President Reagan yesterday not to name William Bradford Reynolds as associate attorney general during Congress' August recess, saying such a move "would be an insult to the Senate and an affront to the Constitution."

In a letter to Reagan on behalf of all 47 Democratic Senators, Byrd reminded the President that the Senate Judiciary Committee rejected Reynolds for the Justice Department's No. 3 position last month.

He said that "a recess appointment of the same individual to the same position would be inappropriate and unacceptable."

Even Republicans cautioned against a recess appointment. Senate Majority Whip Alan K. Simpson (R-Wyo.) said he did not want to see "a subterranean campaign of some kind that would be a distraction from the heavy work load we have around here."

The swift reaction appeared to let much of the steam out of efforts to revive the Reynolds nomination. However, Simpson and Majority Leader Robert J. Dole (Kan.) said they would support a "discharge petition" to force the nomination to the floor.

Dole said there was "widespread" GOP support for that idea.

Reynolds, who has headed the Justice Department's Civil Rights Division for the last four years, was voted down 10 to 8 amid criticism that he had been lax in enforcing civil rights laws and has misled the Senate Judiciary Committee in sworn testimony.

Republicans Arlen Specter (Pa.) and Charles McC. Mathias Jr. (Md.) joined the eight committee Democrats in opposition.

Byrd's letter to Reagan cited a report in yesterday's Washington Post which said that White House officials are calling senators to gauge whether they have enough support to force the Senate to vote on Reynolds' nomination.

But even if such a move is successful, key senators acknowledged, opponents would filibuster the nomination.

The Republicans are unlikely to bring the matter to the floor unless they can muster the 60 votes needed to break a filibuster—a prospect made more unlikely by yesterday's Democratic criticism.

The Post article also said that some administration officials, anticipating a filibuster, are considering giving Reynolds an unusual recess appointment that would allow him to serve through 1986 without Senate confirmation. "The president's laywers know better than that," Byrd said. "That's not what the recess appointment is for." Sources said that if the administration promotes Reynold in August, it would also have to give recess appointments to several top Justice Department officials because an angry Senate would refuse to approve them.

"You wouldn't even get a U.S. attorney through," a Senate official said.

Despite yesterday's negative reaction and the considerable obstacles in their path, some administration officials remain adamant in their desire to promote Reynolds.

These officials, led by Attorney General Edwin Meese III, have argued strongly in the administration that the fight for the nomination should be continued.

First, they believe the Reynolds defeat unfairly tarred the president's civil rights record.

Both White House and Justice Department officials are convinced that Reynolds was "nit-picked to death" by opponents who seized on discrepancies in his statements, rather than challenged on what they see as the heart of the administration's civil rights policy, its opposition to racial quotas.

Second, several administration officials contend that the president needs to have the Judiciary Committee "in line" before a possible Supreme Court nomination. They anticipate at least one opening soon, possibly to succeed Justice Lewis F. Powell Jr. who was recently hospitalized. "The tail is not going to wag the dog on these nominations," said a White House official. "That committee has to understand who is the president of the United States and this is not a good experience to have as we approach bigger battles.

"We expect to get our people confirmed, not to expose them to shooting-gallery politics that embarrasses the president. There

will not be a seond Brad Reynolds . . . there shouldn't be a first.

Many in the administration believe they should not be in a position of defending their policies after a landslide reelection victory last November. They also want to respond to negative votes by Specter and Mathias.

"Winning starts with having your own team in line," a White House official said.

But some leading Republicans said the White House should accept defeat rather than spend more political capital on a fight it is unlikely to win.

[From the Washington Post, July 16, 1985]

WHITE HOUSE HOPES TO REVIVE REYNOLDS PROMOTION AT JUSTICE: RECESS APPOINTMENT, FORCED VOTE CONSIDERED

(By Howard Kurtz and Mary Thornton)

White House officials are checking whether they have enough support to force a vote by the full Senate on William Bradford Reynolds' nomination as associate attorney general, which was rejected by a Senate committee last month.

Some administration officials are also considering the possibility of installing Reynolds in the Justice Department's No. 3 job as a recess appointee after the Senate adjourns Aug. 2, sources said. They said some department officials believe that if the nomination were forced to the Senate floor, and, as expected, encountered a filibuster, a recess appointment could be justified.

"If they do that, this place would shut down," said one high-level Senate official. "They'd go absolutely berserk. It would be an open declaration of war."

Senate Majority Leader Robert J. Dole (R-Kan.) is taking a formal head count of Republicans to gauge the chances of approving a "discharge petition" to bring Reynolds' nomination to the floor.

"If the president wants us to push Brad Reynolds, then we're going to help," Dole said yesterday.

Republicans and Democrats said the alternative—a recess appointment—would be an unprecedented affront to the Senate Judiciary Committee, which turned down the nomination after three weeks of contentious debate. Committee members said they voted against Reynolds, now head of the Justice Department's Civil Rights Division, because he repeatedly misled the panel in sworn testimony and had a lax "four-year record of enforcing civil rights laws.

Under the rarely used procedure of naming a presidential appointee while Congress is in recess, experts say, Reynolds could serve as associate attorney general without confirmation during the 99th Congress, which runs through 1986.

Attorney General Edwin Meese III told reporters last week that he considers the Reynolds nomination to be "still before the Senate. No decision has been made with regard to the next step."

Reynolds did not respond to inquiries yesterday. His spokesman, John Wilson, declined comment on the possibility of a recess appointment, saying, "Some people who oppose him are floating that story."

Meese and other top department officials were at an American Bar Association conference in London and could not be reached.

White House lobbyists have been calling senators in recent days to assess the depth of support for moving Reynolds' nomination to the floor. This would require a majority of voting senators to approve a discharge petition, an unusual device to force an issue from a reluctant committee to the full Senate.

"They're not necessarily trying to raise the Titanic," a Senate official said of the administration. "They're just trying to find out how deep it's buried."

GOP officials cautioned that the Reynolds nomination could tie up the Senate for weeks, while Dole is trying to deal with the federal budget deficit and other key legislation.

"It's not a high priority," one said of the nomination. "We've known all along it would be . . . tough getting the votes. The White House would have to make a . . . convincing case that the votes were there."

A Democratic senator said recently that he told White House officials that resurrecting the Reynolds nomination is "a no-win proposition for the Republicans."

"It would be a source of embarrassment to the Republican senators to make them walk that plank," the senator said. "Either you vote against your president, or you vote for a guy who's painted as being terrible on civil rights."

But there may be some support for Dole's efforts. Judiciary Committee Chairman Strom Thurmond (R-S.C.) would support an effort to bring the nomination to the floor, according to a spokesman.

On June 27, the committee voted, 10 to 8, against the nomination, with Republicans Arlen Specter (PA) and Charles McC. Mathias Jr. (MD) joining all eight Democrats in opposition. Two subsequent votes on reporting the nomination to the floor—either with no recommendation or a negative recommendation—failed on a 9-to-9 tie.

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While the nomination has remained in dispute, the administration has not moved to fill several other vacancies in the Justice Department. Among those widely reported to be in line for top jobs are Herbert E. Ellingwood, chief of the Merit Systems Protection Board, to head the Office of Legal Policy; Charles J. Cooper, a deputy to Reynolds, to head the Office of Legal Counsel, and Carolyn B. Kuhl, now a deputy in the Civil Division, for Reynolds' civil rights post.

UNITED STATES SENATE,
OFFICE OF THE DEMOCRATIC LEADER,
Washington, DC., July 16, 1985.

The PRESIDENT,
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DEAR MR. PRESIDENT: I am writing to you at the instruction of the Democratic Conference with respect to the attached article concerning Assistant Attorney General William Bradford Reynolds which appeared in this morning's Washington Post.

According to the Post report, Administration officials are "considering the possibility of installing Reynolds" as Associate Attorney General "as a recess appointee after the Senate adjourns Aug. 2, sources said."

As you know, on June 27, the Judiciary Committee failed to report Mr. Reynolds' nomination to the Senate by a vote of 8-10. The Conference has asked me to inform you that in view of the Committee's action, a recess appointment of the same individual to the same position during the August break would be inappropriate and unacceptable. We urge you not to make this recess appointment.

Sincerely,

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The forthcoming August recess should not, in our judgment, be considered the kind of extended recess contemplated by Article III, Section 2, Clause 3, of the Constitution. Rather, recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer. Any other interpretation of the Recess Appointments clause could be seen as a deliberate effort to circumvent the Constitutional responsibility of the Senate to advise and consent to such appointments.

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Mr. BYRD. Mr. President, it has been said that life is a series of changes—some profound, some seemingly insignificant, and many others in between. For those of us who serve here in the Senate, this is true no less than for others. One of the ways in which change manifests itself for those of us who have served a number of terms here is when members of the Senate staff are given and accept career opportunities which move them away from this Chamber.

When a staff member has earned the trust and respect of a Member for whom he or she has worked, such departures always are bitter-sweet for the Member. It goes without saying that the staff member's contributions to the vital work that is done in this place will be missed very much. But on the other hand, of course, one must share in the pleasure when another person—particularly one who has worked so capably, energetically, and effectively—has an opportunity to grow or build professionally or explore other areas of life which the pressures of the Senate did not permit.

And so it is with a member of the senior Senate staff who will be departing at the end of this week. Susan Weiss Manes has been an employee of the Senate now for 8 years. She began her service as a legislative assistant for Floyd Haskell, a former Senator from Colorado. Later she served in that same role for Senator DON RIEGLE of Michigan, moving on to become staff director of the Senate Subcommittee on Alcoholism. In 1982, she joined the

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Many in the administration believe they should not be in a position of defending their policies after a landslide reelection victory last November. They also want to respond to negative votes by Specter and Mathias.

"Winning starts with having your own team in line," a White House official said.

But some leading Republicans said the White House should accept defeat rather than spend more political capital on a fight it is unlikely to win.

[From the Washington Post, July 16, 1985]

WHITE HOUSE HOPES TO REVIVE REYNOLDS PROMOTION AT JUSTICE: RECESS APPOINTMENT, FORCED VOTE CONSIDERED

(By Howard Kurtz and Mary Thornton)

White House officials are checking whether they have enough support to force a vote by the full Senate on William Bradford Reynolds' nomination as associate attorney general, which was rejected by a Senate committee last month.

Some administration officials are also considering the possibility of installing Reynolds in the Justice Department's No. 3 job as a recess appointee after the Senate adjourns Aug. 2, sources said. They said some department officials believe that if the nomination were forced to the Senate floor, and, as expected, encountered a filibuster, a recess appointment could be justified.

"If they do that, this place would shut down," said one high-level Senate official. "They'd go absolutely berserk. It would be an open declaration of war."

Senate Majority Leader Robert J. Dole (R-Kan.) is taking a formal head count of Republicans to gauge the chances of approving a "discharge petition" to bring Reynolds' nomination to the floor.

"If the president wants us to push Brad Reynolds, then we're going to help," Dole said yesterday.

Republicans and Democrats said the alternative—a recess appointment—would be an unprecedented affront to the Senate Judiciary Committee, which turned down the nomination after three weeks of contentious debate. Committee members said they voted against Reynolds, now head of the Justice Department's Civil Rights Division, because he repeatedly misled the panel in sworn testimony and had a lax "four-year record of enforcing civil rights laws.

Under the rarely used procedure of naming a presidential appointee while Congress is in recess, experts say, Reynolds could serve as associate attorney general without confirmation during the 99th Congress, which runs through 1986.

Attorney General Edwin Meese III told reporters last week that he considers the Reynolds nomination to be "still before the Senate. No decision has been made with regard to the next step."

Reynolds did not respond to inquiries yesterday. His spokesman, John Wilson, declined comment on the possibility of a recess appointment, saying, "Some people who oppose him are floating that story."

Meese and other top department officials were at an American Bar Association conference in London and could not be reached.

White House lobbyists have been calling senators in recent days to assess the depth of support for moving Reynolds' nomination to the floor. This would require a majority of voting senators to approve a discharge petition, an unusual device to force an issue from a reluctant committee to the full Senate.

"They're not necessarily trying to raise the Titanic," a Senate official said of the administration. "They're just trying to find out how deep it's buried."

GOP officials cautioned that the Reynolds nomination could tie up the Senate for weeks, while Dole is trying to deal with the federal budget deficit and other key legislation.

"It's not a high priority," one said of the nomination. "We've known all along it would be . . . tough getting the votes. The White House would have to make a . . . convincing case that the votes were there."

A Democratic senator said recently that he told White House officials that resurrecting the Reynolds nomination is "a no-win proposition for the Republicans."

"It would be a source of embarrassment to the Republican senators to make them walk that plank," the senator said. "Either you vote against your president, or you vote for a guy who's painted as being terrible on civil rights."

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LEVEL 1 - 1 OF 16 STORIES

The New York Times

December 12, 1984, Wednesday, Late City Final Edition

SECTION: Section A; Page 30, Column 1; Editorial Desk

LENGTH: 282 words

HEADLINE: Legal Services Still the Stepchild President Reagan's fifth annual proposal to eliminate funds for the Legal Services Corporation is not to be confused with most of his other budget austerities. This is a vengeful attack on a program Mr. Reagan has sought to abolish since he was Governor of California, an attack that continues despite Congress's repeated renewal of subsidized legal help for the poor.

BODY:

Besides offering little to deficit reduction, the corporation's $320 million budget deserves to survive because it delivers high-class legal work at bargain rates, mostly from idealistic young lawyers. Occasionally a zealous attorney has indulged in excessive lobbying or filed a suit that alarmed a state official. But whenever Congress has seen abuses it has curbed them, and the program continues to enjoy broad support.

Even when they annoy state and Federal officials with litigation, the program's attorneys have not been costly to taxpayers. For the most part their suits, including those against former Governor Reagan, were meant to force fair distribution of benefits already legislated.

This latest zero-budget request is of a piece with Mr. Reagan's attempts, over four years, to appoint a board of hostile directors to the program. Many of his nominees have been so hostile that the Senate wouldn't confirm them. So Mr. Reagan skirted the confirmation process by making only recess appointments when Congress was away.

And while trying to starve legal services, the program's officers have been raiding its treasury to nourish right-wing causes. Two recent grants, awarded without proper public notice, will support research centers that promote Administration positions on constitutional law and the medical treatment of handicapped infants.

Even unconfirmed directors of Legal Services have the right to bypass the Administration and apply directly to Congress for the funds their programs require. A vigilant Senate can observe how vigorously the board members strive to save the program before deciding whether to confirm any of them next year.

TYPE: editorial

SUBJECT: Terms not available

LEVEL 1 - 2 OF 16 STORIES

The New York Times

November 27, 1984, Tuesday, Late City Final Edition

SECTION: Section A; Page 30, Column 1; Editorial Desk

LENGTH: 261 words

HEADLINE: Poor Poverty Law

BODY:

Congress being out of session, it's time again for the Reagan White House to try stacking the Legal Services Corporation with board members hostile to the program Congress set up to provide legal help to the poor.

When Congress is sitting, the Senate won't confirm the kind of nominee the President likes. The only way he knows to staff the board is by appointing temporary directors by recess appointments. Even if rejected by the Senate, they can serve until the end of the next session of Congress.

Last week he did it again, naming 11 recess appointees, bringing to 40 the number of such end runs around the confirmation process in four years. President Reagan, approaching his second term, has yet to do his legal duty to nominate 11 confirmable directors. A few directors have been recess - appointed and later formally nominated. In 1981 a few of these came close to confirmation, only to have their nominations withdrawn because the White House found them insufficiently loyal to its plan to cripple legal services across the country. Congress possesses only limited powers to force compliance with the Legal Services Act, but now it needs to use those powers to the hilt.

One is to retain restrictions on what an unconfirmed board can do to take money away from a poverty law program. It might insist that unconfirmed directors not be paid. And it needn't confirm any director whose performance as a recess appointee fails to show a commitment to the purpose of the program: giving poor people decent representation when they have legal problems.

TYPE: EDITORIAL

SUBJECT: APPOINTMENTS AND EXECUTIVE CHANGES; BOARDS OF DIRECTORS; LEGAL AID FOR THE POOR; FINANCES; FEDERAL AID (US); EDITORIALS

ORGANIZATION: LEGAL SERVICES CORP

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: UNITED STATES

LEVEL 1 - 3 OF 16 STORIES

May 7, 1984, Monday, Late City Final Edition

SECTION: Section A; Page 18, Column 1; Editorial Desk

LENGTH: 379 words

BODY:

Now Judge Legal Services Legally Having failed in three years of guerrilla warfare to destroy the Federal Legal Services Corporation, President Reagan is now pursuing the campaign above board. He tried to strangle the program through '' recess' ' appointees, illegally evading Senate confirmation. Congress responded by denying these directors the power to strip funding from disfavored poverty law offices. Now Mr. Reagan has finally done his minimum legal duty and properly nominated 11 board members.

Now it is up to the Senate to do its minimum duty by carefully scrutinizing the nominees. If those who share the President's hostility or indifference to the idea of providing legal services to the poor are not rejected, the confirmation process that Congress insisted upon will have lost all meaning.

The Senate Labor Committee has let all 11 nominees slip by with scant attention. A few of them have proper credentials, at least on paper, if not the requisite commitment to the job. Most have no record at all in the field. Even the committee had trouble with two of them, LeaAnne Bernstein and Michael Wallace, who appeared highly antagonistic to the program. Mrs. Bernstein, who as an executive secretary tried to carry out the destructive policies of the recess appointees, eked out a 10-to-8 vote. The name of Mr. Wallace, whose contributions to the poor include efforts to win tax breaks for racist private schools, goes to the Senate floor on the strength of a 9-to-9 committee tie. To vindicate their own powers, senators now have to put the questions the committee failed to pursue vigorously. Not every board member is supposed to be a ghetto lawyer battling for his neighbors. But every one, lawyer or layman, should have shown at some time an interest in equal access to justice for the poor. A pledge to fight for the program would be in order, as would a willingness to ask the White House to fund the corporation properly. The four Reagan budgets have not contained any funding for Legal Services. The Republican-led Senate has waited a long time for even this meager deference to a program enjoying broad bipartisan support. Two of the nominees deserve outright rejection. Let the others be held up until their qualifications are clear.

TYPE: Editorial

SUBJECT: Terms not available

LEVEL 1 - 4 OF 16 STORIES

February 5, 1984, Sunday, Late City Final Edition

SECTION: Section 4; Page 18, Column 1; Editorial Desk

LENGTH: 173 words

HEADLINE: Topics Disrupted Services

BODY:

Recess Mischief

Once again the Reagan Administration has budgeted zero dollars for the Legal Services Corporation, the best program yet devised for providing lawyers to the poor. Once again Congress is sure to keep the corporation alive. Even the puppet directors, installed by Reagan recess appointments to circumvent the Senate confirmation process, have recommended $325 million for 1985 to overcome the damage done by recent budget-slashings.

While Congress will ignore the White House's cruel budget gesture, it should not be ignoring those recess appointments. President Reagan has never met his legal obligation to nominate and install a Senate-confirmed board of directors. He has just made his 18th and 19th '' recess' ' appointments. The Constitution allows recess appointments for emergencies if Congress is absent. The latest emergency, apparently, was the imminent return of Congress. If Congress can't force the White House to obey the law, it should redesign legal services and refuse to pay unapproved directors.

TYPE: EDITORIAL

SUBJECT: EDITORIALS; TOPICS (TIMES COLUMN); FINANCES; BUDGETS AND BUDGETING

ORGANIZATION: LEGAL SERVICES CORP

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: UNITED STATES

LEVEL 1 - 5 OF 16 STORIES

The New York Times

January 3, 1984, Tuesday, Late City Final Edition

SECTION: Section A; Page 18, Column 1; Editorial Desk

LENGTH: 467 words

HEADLINE: A Bitter Latin Coup

BODY:

The Reagan Administration's effort to wreck a small but esteemed nonpartisan operation in Latin America proves how desperately it prefers doctrinal purity to effective policy. The Inter-American Foundation has been a highly useful aid agency whose nonpartisan character was prescribed by Congress and respected by three previous Administrations. That concept was finally scuttled when the foundation's board, with Congress away, voted on party lines to fire its respected director, for slight and suspect reasons.

Congress gave the foundation the deliberately experimental task of promoting small-scale, self- help programs in the hemisphere. This modest $23 million program - in a total foreign aid budget of $4.6 billion - was expressly given a high degree of autonomy and a nonpartisan governing board. Most of the foundation's grants are for less than $50,000 and go to private groups and enterprises in 29 countries - the kind that often make a critical difference but might otherwise be overlooked. Many on the staff are former Peace Corps volunteers applying an unashamed idealism to help farm cooperatives or out-of-the-way businesses of social value.

Early in the Reagan Administration, a budget official wrote to Peter Bell, the foundation's president, to ask what authority justified the agency's claim to autonomy. A surprised Mr. Bell cited Congress's clear desire to insulate his work ''from the ebb and flow of political currents.'' A month later, the conservative Heritage Foundation, though conceding that the agency had done much good, accused it of favoring ''collectivism'' over free enterprise in ways ''incompatible with the philosophy of the Reagan Administration.'' Mr. Bell rejoined that $100 million out of grants totaling $135 million had gone to private businesses and farms, and that in any case the foundation was not meant to be the policy tool of a single Administration. Undeterred, the Administration brought the foundation to heel by naming to its board a conservative chairman and two State Department officials - by recess appointments, without Congressional approval. This majority has now ousted Mr. Bell for his incompatible ''chemistry.'' The deplorable effect will be to dissipate the agency's most precious resource: its credibility as a nonpolitical source of aid. Its greatest contribution had been the contacts it developed at the grass roots, normally unreachable through embassies. Whether this useful work can continue depends on the sincerity of Administration assertions that it will. If a divided board names a new president whose main qualification is fealty to right-wing causes, that would turn the foundation's purpose on its head. Congress should pay attention and move in to defend its original good idea.

TYPE: EDITORIAL

SUBJECT: EDITORIALS; SUSPENSIONS, DISMISSALS AND RESIGNATIONS; UNITED STATES INTERNATIONAL RELATIONS

ORGANIZATION: INTER-AMERICAN FOUNDATION

NAME: REAGAN, RONALD WILSON (PRES); BELL, PETER

LEVEL 1 - 6 OF 16 STORIES

November 29, 1983, Tuesday, Late City Final Edition

SECTION: Section A; Page 30, Column 1; Editorial Desk

LENGTH: 406 words

HEADLINE: More Lawlessness in Legal Services

BODY:

President Reagan, who has nursed a grudge against poverty lawyers ever since they whipped him in court when he was Governor of California, continues his lawless effort to destroy the national Legal Services Corporation.

Though obligated to nominate a slate of 11 qualified directors for the agency, which administers grants to neighborhood law offices, Mr. Reagan has yet to do so. He apparently fears that the Senate would not confirm candidates who would carry out his desire to dismantle the program. So he's pursuing that goal by abusing his power to make recess appointments.

The President is supposed to nominate and the Senate confirm or reject his nominees. But when a vacancy occurs too late for Senate action, the President may make an appointment when Congress is in recess. Most Presidents submit such nominations when Congress returns, but President Reagan refuses to do so, and his appointees may then remain in place. As soon as Congress recessed last Friday, Mr. Reagan made another such appointment - his 17th in three years.

The President's approach mocks the procedural tradition and the intent of Congress for this agency. Congress specified that poor people as well as lawyers obtain seats on the board. To fill the ''poor'' seat, Mr. Reagan first appointed a middle- class student working his way through college. When his term expired last week, Mr. Reagan replaced him with Ronald Frankum, who just resigned as deputy White House science adviser. He's a lawyer whose resume of jobs boasts ''six Fortune 100 companies in the aerospace, telecommunications and weapons fields.'' The agency's rump board now consists entirely of recess appointees. Last month they drastically restricted rules of client eligibility. They then resolved that local programs must dedicate one dollar in eight to the hiring of private attorneys in their communities. The Reagan board apparently prefers a welfare program for lawyers to the use of less costly, more expert staff attorneys. Congress has fought back to some extent by forbidding the defunding of any programs by an unconfirmed board. Such a restriction would be an insult to a management that was performing seriously and in good faith. But the Administration's poverty law managers have richly earned the mistrust. If the President continues to abuse the recess appointment process, Congress may have to impose even greater restrictions next year.

TYPE: Editorial

SUBJECT: Terms not available

LEVEL 1 - 7 OF 16 STORIES

November 17, 1983, Thursday, Late City Final Edition

SECTION: Section A; Page 26, Column 1; Editorial Desk

LENGTH: 491 words

HEADLINE: The Law, the Poor and the Torpedoes

BODY:

President Reagan is so hostile to the Federal program of legal services for the poor that only the crudeness of his tactics has saved it.

Repeatedly he has asked Congress to ''zero out'' appropriations for the Legal Services Corporation. Repeatedly Congress has refused. So Mr. Reagan has tried to torpedo the agency administratively, by installing directors and officers who will dismantle the agency - or by failing to install enough directors at all. He's supposed to nominate 11 but can't, or won't, come up with a full slate fit for Senate confirmation.

Mr. Reagan's aim is clear from the pattern of changes recently wrought by the recess appointees he named when Congress was out of town. The Senate has now rightly prevented further damage by withholding confirmation of Mr. Reagan's latest, still incomplete roster of nominees for the board.

Congress wanted a strong, professionally responsible system of legal services nationwide. It designed a semi-independent corporation to set policy and dispense grants to state and local legal aid programs. The programs, Congress knew, could be controversial. They can provide lawyers to get debtors out of hock - and serve as neighborhood law firms to help lift slum communities out of poverty. So it was important to insulate the program from potentially antagonistic Presidents.

There's not enough insulation to protect against the four Reagan appointees, who now serve as the corporation's directors. They met last week to demolish some of poverty law's best work and make it much harder for poor people to qualify for legal services. They will allow no more representation of housing cooperatives, economic development associations for low-income people or other clients capable of helping entire neighborhoods. Welfare recipients will no longer be automatically eligible for free legal services. The elderly and handicapped poor are especially hard hit. The rump board of directors also passed rules that may deny funding to any legal services office. On what basis? Not for poor performance but because headquarters deems some other applicant better qualified. In other words, the corporation could de-fund a program whose success incurred the wrath of a governor or President. The House and Senate have now agreed that unless there is a Senate-confirmed board of directors by Jan. 1, all programs are assured their grants for 1984. In his three years in the White House, Mr. Reagan has proposed 26 people for the board. Not one has been confirmed by the Republican-controlled Senate. Only four of his current slate of eight nominees come close to qualifying for the job. The Senate properly held back on confirming even those four until the President identifies all his choices for the board. Mr. Reagan has not earned the right to set legal services policy. Congress should continue to deny him the power to meddle with

it through manipulated appointments.

TYPE: Editorial

SUBJECT: Terms not available

LEVEL 1 - 8 OF 16 STORIES

The New York Times

October 12, 1983, Wednesday, Late City Final Edition

SECTION: Section A; Page 22, Column 1; Editorial Desk

LENGTH: 367 words

HEADLINE: Late and Lame on Legal Services

BODY:

For the first time since his inaugural vows to execute the laws faithfully, President Reagan has complied with the Legal Services Corporation Act of 1974. It requires him to nominate 11 directors of the federally funded poverty law program. Mr. Reagan wants the program abolished, but Congress won't oblige, so he tried to starve it with budget cuts, inexperienced administrators and the recess appointment of directors who would never survive a Senate confirmation hearing.

Now, at last, Mr. Reagan has sent a full slate of 11 directors to the Senate, which must assess their commitment to equal justice for those who can't afford lawyers in civil matters. In light of recent history, the evaluation had better be thorough; none of the eight men and three women can claim a national reputation for service to legal aid.

Mr. Reagan has opposed Legal Services ever since some of its California branches sued him as Governor, winning court orders for fairer administration of laws designed to help the poor. In Mr. Reagan's view, the poor may be entitled to legal help with divorces or stalling creditors, but they're not supposed to rise up and demand that welfare or food-stamp officials fulfill their legal obligations.

Yet when Congress set up Legal Services, its clear intention was to give the poor help with class actions and other litigation methods long available to the affluent. If equal access to justice means anything, the reasoning went, it means that the poor, just like the rich, must be able to band together and take government to court, not merely defend themselves when others sue them.

Such use of the law offends Mr. Reagan and other opponents as ''social engineering.'' But Congress has reaffirmed its vision of the program on a number of occasions. Most recently, it beat back Administration attempts to severely curb services for the elderly and to make it all but impossible for Legal Services to bring class actions.

The President's current appointees include accomplished people. But the agency needs directors committed to a vigorous program. Before confirming, the Senate ought to make sure any new board understands how seriously Congress takes its own intentions.

TYPE: Editorial

SUBJECT: Terms not available

LEVEL 1 - 9 OF 16 STORIES

The New York Times

September 8, 1983, Thursday, Late City Final Edition

SECTION: Section A; Page 22, Column 1; Editorial Desk

LENGTH: 514 words

HEADLINE: Illegal Raids on Legal Services

BODY:

The Federal program of legal services for the poor is under siege again. Ronald Reagan couldn't kill it when he was Governor of California, but as President he keeps trying. Unable to persuade Congress to abolish the Legal Services Corporation, he has installed a wrecking crew to smash from within. Now a loud Senate minority seeks to tar the program with the odd charge that its lawyers have tried to ward off the Reaganite attacks.

Congress, which created the corporation in 1974 and tried to protect it from political attack, may have to enact further safeguards. No legislature can compel enlightened administration of this humane and progressive program. But Congress can punish obstructions of its will.

Legal Services, a successful product of the Great Society, had few enemies even in later Republican Administrations, but they were often in high places, like governors' mansions. Most lawyers welcomed the legal effort to give the poor more equal treatment and a fairer share of government benefits, but state and local officials resented suits that charged them with mismanagement or neglect of the poor.

Mr. Reagan's hostility to Legal Services was well known, but killing the federally funded corporation was no part of his election mandate. Yet, though Congress and the American Bar Association warmly support the program, the President has refused to obey the law's requirement that he nominate 11 directors for Senate confirmation. He has run the corporation into the ground with recess appointees, currently a bare quorum of four directors, who have installed administrators hostile to the law's purposes. These appointees have been happy to help Senators Orrin Hatch and Jeremiah Denton try to prove that the program is filled with political lawyers advancing a social agenda. The corporation's president, Donald Bogard, approved raids on regional offices in search of evidence of illegal lobbying. What they have turned up are a few ill-considered statements by lawyers rallying a defense against the Reagan Administration's assault on the corporation. The Senators' most serious charge is simply that poverty lawyers have been instructing members of Congress how the law's intent is being thwarted. Now the corporation's unconfirmed directors propose rules that threaten to thwart it further. One would let the corporation take funds from any of the 336 existing law offices and give them to a ''better qualified'' agent. That's an invitation to starve the most diligent offices. Another proposal would put pressure on grant recipients to reject clients, especially the elderly poor, who have scraped up $15,000 worth of equity in a home. An aroused Congress stipulated last year that no de-funding action could be taken by an unconfirmed board. The legislators now need to strengthen such safeguards against the complete dismantling of Legal Services. These assaults will not end until the Administration realizes that it is not only hurting the

poor but also offending a more powerful constituency whose sense of fairness has been steadily abused.

TYPE: EDITORIAL

SUBJECT: EDITORIALS; LEGAL AID FOR THE POOR; LAW AND LEGISLATION; APPOINTMENTS AND EXECUTIVE CHANGES; BOARDS OF DIRECTORS

ORGANIZATION: LEGAL SERVICES CORP

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: UNITED STATES (1983 PART 1)

LEVEL 1 - 10 OF 16 STORIES

June 1, 1983, Wednesday, Late City Final Edition

SECTION: Section A; Page 22, Column 1; Editorial Desk

LENGTH: 435 words

HEADLINE: Make Legal Services Legal

BODY:

President Reagan persists in his malign neglect of legal services for the poor. He ignores his duty, in law, to nominate 11 directors for the Legal Services Corporation, which manages poverty law projects across the country. And for the third year in a row, he has asked Congress to stop funding the corporation. The President is entitled to his personal view of the law, but he also has an obligation to execute it faithfully.

Congress, wisely, continues to support the program and to ignore the President's budget ploy. But it should also do something about the lawless denial of proper leadership to the corporation. The House Judiciary Committee has found a way: Deny both pay and power to the directors who have been appointed illegally.

Mr. Reagan has put only five directors on the board and has refused to submit their names, or any others, for Senate confirmation. All five are serving through a misuse of the President's power to make recess appointments.

That's a power the Constitution gives the President to keep Government running smoothly when Congress is not in session. The idea, born when Congress sat only a few months a year, was to let the President fill unexpected administrative and judi-cial vacancies. Such appointments lapse at the close of the next session of Congress.

Most Presidents have respected the Constitution's design by following up with formal nominations as soon as Congress returned. But Mr. Reagan has manipulated appointments to deny the Senate its power to advise and consent at Legal Services. His directors have all been recess appointees, and most shared his hostility to the program Congress created; few would ever be confirmed.

Congress is finally responding in a creative way. The House committee would stop payments of all recess appointees except those named between sessions of Congress or within 30 days of the end of a session. Just as important, it would stipulate that only a properly appointed board could reduce the funding for any legal services project.

Constructively, the committee has also moved to approve a $296 million budget authorization for Legal Services. That won't rehire all the lawyers cut since 1981, when a barely adequate $321 million budget was slashed by 25 percent. But it's a step in the right direction. In self-respect, the House and Senate ought to endorse a decent budget and resist the theft of office that Congress as well as the President has a right to fill.

TYPE: Editorial

SUBJECT: EDITORIALS

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: LEGAL AID FOR THE POOR

LEVEL 1 - 11 OF 16 STORIES

The New York Times

April 14, 1983, Thursday, Late City Final Edition

SECTION: Section A; Page 30, Column 1; Editorial Desk

LENGTH: 404 words

HEADLINE: Put Legal Back Into Legal Services

BODY:

The Comptroller General says it's legal to pay $221 a day to the directors of the Legal Services Corporation even though none of those appointed by President Reagan has yet been confirmed by the Senate. Though that's technically right, the moral and political wrong continues and Congress should fix it.

Bad enough that Mr. Reagan seeks only directors who want to wreck the program that provides lawyers for the poor. It becomes perverse when the public must pay salaries to nominees whom the President won't even formally nominate, and thus submit to the confirmation process.

The President wants to abolish the program or give it no money at all, but Congress won't hear of that. So how has he responded? Recess appointees have been running the ailing, underfunded corporation throughout his Administration, now 27 months old. How much longer will Congress put up with this lawlessness?

Under the legal services law, the President is supposed to nominate 11 directors and submit their names to the Senate for approval. Recess appointments may be necessary to keep an agency running when the Senate is not in session, but the President is supposed to submit the names when the Senate reconvenes. Last year Mr. Reagan did nominate eight directors, but when the Senate made clear it would reject two, he withdrew all eight. Since then he has placed five recess appointees on the board but nominated none.

Administration officials say they are looking for nominees, but how seriously? Recently they tried to recruit Ben Blackburn, a former Georgia Congressman. He opposed the 1974 law creating the program and he still opposes it. His idea of humor is to joke about hanging public-housing tenants. His idea of civil rights is to lament the Federal law prohibiting literacy tests for voting. Wiser than the White House recruiters, he spurned their advances, saying he didn't want to be a target for Congressional supporters of legal services.

Having failed to persuade Congress to abolish this popular, effective and humane program, Mr. Reagan has a duty to administer it, not undermine it. Until he does, Congress should deny compensation to this lawlessly constituted board. Meanwhile the Senate could drive the point home by denying confirmation to nominees for other jobs. When a President unilaterally suspends the nomination process, it would be only just for the Senate to suspend the confirmation process.

TYPE: Editorial

SUBJECT: UNITED STATES POLITICS AND GOVERNMENT; APPOINTMENTS AND EXECUTIVE CHANGES; WAGES AND SALARIES; FEDERAL AID (US); EDITORIALS

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: LEGAL AID FOR THE POOR

LEVEL 1 - 12 OF 16 STORIES

The New York Times

January 27, 1983, Thursday, Late City Final Edition

SECTION: Section A; Page 18, Column 1; Editorial Desk

LENGTH: 301 words

HEADLINE: Legal Services Outside the Law

BODY:

None of the four men President Reagan has appointed to the board of the Legal Services Corporation actively opposes providing effective lawyers to the poor. That is faint praise, but a great leap forward. Last year the President tried to ruin the program by entrusting it to known opponents.

Still, Mr. Reagan stands far from compliance with the law's requirement to nominate 11 directors who can be confirmed by the Senate.

In two years, the President has yet to achieve confirmation for a single board member. That is because the Senate seems unwilling to accommodate his plan to run the program into the ground. Mr. Reagan has therefore tried to achieve his end with so-called recess appointees.

The Constitution permits recess appointments when Congress is not sitting so that government can function. But letting them continue to serve without nomination violates the traditional understanding that they will be submitted for Senate confirmation soon after Congress reconvenes.

Unless he promptly submits nominations now, Mr. Reagan's intention to kill the program illegally will be plain. Yet a White House spokesman says the President remains undecided about whether he will. In other words, Mr. Reagan may again decide to monitor - and intimidate - his appointees for yet another year and finally nominate only those who will serve his devious purpose.

That turns the Constitution upside down. It not only robs the Senate of the advise-and-consent power but shifts it to the President.

Will the Senate let this happen? Not if it values its place in government; an easy way to reassert itself would be to hold up confirmation of every Presidential nominee until Mr. Reagan includes his Legal Services board. It is not too much to ask a President to execute the law in spirit and in fact.

TYPE: Editorial

SUBJECT: APPOINTMENTS AND EXECUTIVE CHANGES; UNITED STATES POLITICS AND GOVERNMENT; EDITORIALS

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: LEGAL AID FOR THE POOR

LEVEL 1 - 13 OF 16 STORIES

December 13, 1982, Monday, Late City Final Edition

SECTION: Section A; Page 22, Column 1; Editorial Desk

LENGTH: 588 words

HEADLINE: Insult to the Poor, and the Constitution

BODY:

Not content with abusing the poor by trying to gut their legal services program, President Reagan is extending the insult to the United States Senate. His sudden withdrawal of all his nominations for the Legal Services Corporation's board of directors brings chaos to the organization and cynically frustrates the Senate's ability to protect it with its advise-and-consent power. The maneuver is a gross abuse of the President's authority to make so-called recess appointments.

The Constitution lets Presidents fill vacancies during Senate recesses to keep the Government running, on the understanding that those so appointed will be duly nominated and subjected to the confirmation process when the Senate reconvenes. Mr. Reagan, unable to persuade Congress to scrap Legal Services altogether, has installed recess appointees who aim to cripple the program.

The leaders of the wrecking operation are William Harvey, a law professor who is chairman of the legal services board, and William Olson, a former officer of the Young Americans for Freedom. They have offered rules that would make it impossible for the poor to file class actions, an effective legal device that settles the claims of numerous people in a single lawsuit.

Though sloppily drafted, their proposals convey an unmistakable contempt for the poor by denying them access to an avenue of justice fully available to the affluent. Last week 53 Senators asked their leadership to hold the Harvey and Olson nominations while confirming six other directors who have acted more independently of the White House.

That's when President Reagan pulled all the names. His spokesman, Larry Speakes, explained with appalling candor that the six - but not Mr. Harvey and Mr. Olson - had failed their screen tests. ''The President has had the opportunity to observe these nominees in a recess appointment capacity over the past year,'' he said. ''He will submit names that he feels are more philosophically in tune with his policies.''

The practical effect of the withdrawal is to leave the recess appointees in place, where they may continue to undermine the program. In fact, the lame duck board may give its approval to the Harvey / Olson class action rules this week.

This wild procedure assaults the constitutional system. Presidents may try to influence courts and agencies by their choice of nominees, but they are not supposed to make provisional appointments and then yank them when the appointees behave independently. Nor are they supposed to perpetuate recess appointees in office by withdrawing their nominations when the Senate shows hostility.

The whole performance reveals a shocking disregard for the sense of Congress when it created Legal Services in 1974. The lawmakers made clear that the corporation's directors were to be willing to support lawyers who might find it necessary to file lawsuits offensive to some politicians.

But the main issue is larger still: Mr. Reagan is simply refusing to grant the Senate its constitutional power of advise and consent. His actions are so far out constitutionally that even an aroused Senate may not easily correct them. One place to begin might be a sense-of-the-Senate resolution that reasserts Congress's prerogatives and notifies the White House that this valuable program - not to mention the Constitution - will be defended.

TYPE: Editorial

SUBJECT: APPOINTMENTS AND EXECUTIVE CHANGES; UNITED STATES POLITICS AND GOVERNMENT

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: LEGAL AID FOR THE POOR

December 5, 1982, Sunday, Late City Final Edition

SECTION: Section 4; Page 18, Column 1; Editorial Desk

LENGTH: 514 words

HEADLINE: More Legal Insults for the Poor

BODY:

What would you think of a law that gave you the right to sue the Government for depriving you of your rights - provided only that no public funds be used to redress the grievance if you win? No one even dreams of such a law for suits by those who can afford a lawyer, but President Reagan's appointed guardians of the national poverty law program want just such a rule for the poor.

Their proposal takes the form of draft guidelines for the Legal Services Corporation, the federally funded system for helping the poor in civil cases. Congress told the corporation to write rules for class actions, which are lawsuits filed on behalf of large groups of people who share a legal grievance. But instead of regulating class lawsuits, the new proposal would eliminate them for the poor -and only the poor.

Class actions are useful tools in business litigation and other cases involving persons too numerous to sue individually. A unanimous Supreme Court praised the device in a complicated 1979 Social Security case because it ''saves the resources of both the courts and the parties by permitting an issue potentially affecting every Social Security beneficiary to be litigated in an economical fashion.'' The device gives the plaintiffs the strength of numbers, if they can afford to sue.

The idea of banning awards from public funds is only the most blatant discrimination against the poor. The other proposed technical hurdles are dazzling. For example, a legal services program could not sue in the name of all injured families over a maladministered school lunch program without the advance consent of every affected family. Even the courts have no right to require litigants, rich or poor, to run that obstacle course.

A staff lawyer who so misread the commission's purpose and the law's intent ought to be sent to retake the bar exam. But these guidelines were written not by staffers or clerks but by directors named by the President: Chairman William Harvey, a law professor in Indianapolis, and William Olson, a Washington attorney. Both share Mr. Reagan's hostility to legal services.

Congress tried mightily in 1974 to nourish legal services by creating an independent corporation that would foster competent, fearless legal representation free from political meddling. The White House has frustrated this system by nominating directors, notably Mr. Harvey and Mr. Olson, who are unacceptable to Senate friends of the program but serve under recess appointments. Required by the 1974 law to appoint some directors who are eligible clients, the Administration picked a 23-year-old son of middle-class parents who is working his way through college.

Such parodies of poverty law are ridiculous but not amusing. They not only cheat but insult the poor. Congress has little time to rescue this program from the Reagan wrecking crew. The Senate can begin by voting promptly to reject the Harvey and Olson nominations.

TYPE: editorial

SUBJECT: LAW AND LEGISLATION; SUITS AND LITIGATION

GEOGRAPHIC: LEGAL AID FOR THE POOR

LEVEL 1 - 15 OF 16 STORIES

The New York Times

November 6, 1982, Saturday, Late City Final Edition

SECTION: Section 1; Page 26, Column 1; Editorial Desk

LENGTH: 473 words

HEADLINE: Cruel Joke on Poverty Law

BODY:

Having failed to destroy the Legal Services Corporation, President Reagan now seeks to bury it in ridicule. Congress created the corporation in hopes that a federally funded agency could give legal help to poor people without political interference. The President, an old foe of poverty lawyers, has tried to stack the corporation's board with other enemies of the program. But the law mandates that some directors represent ''eligible clients'' - poor people -not just lawyers.

That created a problem. Typical legal service clients, after all, appreciate the program; they aren't likely to go along with other board members notable for their lack of enthusiasm. The White House decided to meet this challenge by scouring the countryside for someone like-minded yet not wealthy. In the farmlands near Front Royal, Va., the talent scouts discovered Daniel Rathbun, a 23-yearold pre-law student at a small religious school called Christendom College.

Mr. Rathbun's poverty would be acceptable at a suburban dinner party. He is working his way through college and, the Administration reports, he has declared financial independence from his parents. (Except perhaps in 1981; the elder Rathbuns, a working couple making $32,000 a year, told William Freivogel of The St. Louis Post-Dispatch that they had claimed Daniel as a dependent on their tax return for that year.)

At Legal Services, Mr. Rathbun fits right in. He and the 10 other board members have already started to wreck and demoralize the program. Last weekend they chose as their new president Richard Bogard, litigation chief for an Indianapolis food processing company, with no experience or demonstrated interest in representing the poor.

The appointment of Mr. Rathbun, in short, is a cruel joke on the 40 million genuinely poor Americans whose hunger, joblessness and housing create the legal problems the corporation is supposed to address. He, like the other Legal Services board members, now serves under a recess appointment, subject to eventual Senate confirmation.—That will give the Senate, which has defended legal services on a broad and bipartisan basis, a chance to assert once again that such antics are not to be tolerated in so needed a program.

In the meantime, we hope that Mr. Rathbun does not have any legal problems that might cause him to seek help at a poverty law office. His technical income eligibility is shaky. In fact, as a poverty law client he would look a lot like the welfare Cadillac owners and foodstamp scammers whom the President and other Legal Services detractors are so quick to denounce. As such, these days, he might well be turned away.

TYPE: Editorial

SUBJECT: APPOINTMENTS AND EXECUTIVE CHANGES; FEDERAL AID (US)

GEOGRAPHIC: LEGAL AID FOR THE POOR

LEVEL 1 - 16 OF 16 STORIES

January 10, 1982, Sunday, Late City Final Edition

SECTION: Section 4; Page 22, Column 1; Editorial Desk

LENGTH: 282 words

HEADLINE: Topics;
Matters of Law;
Stacked Deck

BODY:

Stymied in its effort to eliminate the Legal Services Corporation, the White House has stacked the organization's 11-member board with seven recess appointees. The action seems innocent on its face; recess appointments are intended to insure continuity until the Senate can confirm permanent appointments. There's a risk, though, that in the meantime, hostile interim directors will eviscerate this invaluable program.

It is no secret that the Reagan Administration dislikes Legal Services. It didn't bother to replace 11 directors of the program when their terms expired last year. Instead, it proposed dissolving it altogether. Legal Services survived in Congress, but with its budget cut by a quarter, to $241 million. Only then did the Administration start naming directors. With the Senate away for the holidays, these were made as recess appointments. Then, at a hastily convened meeting on New Year's Eve, seven new directors ominously elected William Olson chairman. Mr. Olson headed the Reagan transition team that was openly hostile to the program.

The haste leads Legal Service supporters to fear that the President means to give the recess appointees freedom to control grants and recipients without first establishing, through confirmation hearings, that they have the best interests of the program and its clients at heart.

There is a ready answer to such fears: for the President promptly to nominate permanent directors. Mr. Reagan won the election; he has the right to nominate people of his philosophy - but not to thwart the Senate's duty to advise and consent.

TYPE: editorial

SUBJECT: 010-22-54; APPOINTMENTS AND EXECUTIVE CHANGES

NAME: REAGAN, RONALD WILSON (PRES)

GEOGRAPHIC: LEGAL AID FOR THE POOR

The motion to lay on the table was agreed to.

SENATE RESOLUTION (S. RES. 194)—RELATING TO RECESS APPOINTMENTS

Mr. BYRD. Mr. President, on behalf of Senator PROXMIRE, I send a resolution to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A resolution (S. Res. 194) relating to recess appointments.

The PRESIDING OFFICER. Without objection, the Senate will proceed to its immediate consideration.

Mr. PROXMIRE. Mr. President, this resolution would send a strong signal to the White House that recess appointments should not be made to fill vacancies on the Federal Reserve Board except under unusual circumstances and only for the purpose of fulfilling a demonstrable and urgent need in the administration of the Board's activities. The resolution also indicates it is the sense of the Senate that nominations to the Federal Reserve Board should be considered expeditiously by the Senate.

Mr. President, the issue of recess appointments to the Federal Reserve arose in connection with the nomination of Martha Seger which was approved by the Senate on June 13. It is not my purpose to reopen the debate on the wisdom of that nomination. The Senate has expressed its will on the nomination, and I accept the judgment of the Senate. At the same time, I am concerned that the Senate's approval of Ms. Seger not be construed as a precedent to signify the Senate's acquiescence in an unlimited use of the President's recess appointment authority to the Federal Reserve Board. Of course, there is no legal way the Senate can tell the President how to exercise his constitutional recess appointment authority. At the same time, the Senate has the constitutional responsibility to advise and consent on nominations and within that context, we have the right and indeed the duty to advise the President of what we believe to be our legitimate rights under the Constitution.

Mr. President, unlike agencies of the executive branch, the Federal Reserve has a unique status within the Federal Government. Under article I, section 8 of the Constitution, Congress is assigned the exclusive power to "coin money and regulate the value thereof." This grant of authority to the Congress is the foundation for the exercise of monetary policy. Congress delegated its monetary powers to the Federal Reserve System in the Federal Reserve Act of 1913. Under that act, monetary policy decisions are made by a seven-member Board of Governors appointed by the President by and with the advice and consent of the Senate and by the presidents of the 12 regional Federal Reserve banks.

In order to insulate the members of the Board from political pressure, Congress provided for fixed 14-year terms of service. The Federal Reserve thus has a substantial degree of independence from both the President and the Congress. Since the President has no monetary powers under the Constitution, the Federal Reserve is not subject to the policy control of the President or other officials of the executive branch. And while the Federal Reserve is a creature of the Congress and ultimately responsible to it, as a matter of practice, Congress has refrained from attempting to issue specific policy directives to the Federal Reserve. Because of this independence, the Federal Reserve has from time to time been able to take actions that have been politically unpopular in the short run but which have been proven to have been in the long run best interest of the country. The recent dramatic decline in the rate of inflation from 1979 to 1982 engineered by monetary policy is a case in point.

Because of the unique role of the Federal Reserve in our monetary system, a recess appointment to the Board places the nominee in an extremely awkard position. the nominee is entitled to participate fully in monetary policy decisions but without the protections afforded by a fixed, 14-year term. Until a recess appointment has been confirmed by the Senate, it can be withdrawn at any time by the President. Thus a member of the Board serving under a recess appointment is in effect serving at the pleasure of the President. As a result, it is possible for a President to gain influence over the conduct of monetary policy which would otherwise be denied under the Constitution and the Federal Reserve Act.

A recess appointee is also subject to the risk that he or she might not be confirmed by the Senate if the Senate takes exception to a vote or series of votes. Perhaps some Members of the Senate might like the idea of giving a nominee a trial period before voting to confirm them for a full term. It has a certain superficial appeal. But it runs contrary to the deliberate decision by the Congress to delegate its monetary responsibilities to an independent Federal Reserve System. The independence of the Federal Reserve would be seriously compromised if its Governors were serving under short term appointments pending Senate confirmation.

Mr. President, there is a certain amount of tension between the President's constitution recess appointment authority and the constitutional duty of the Senate to advise and consent on nominations. Clearly, the recess appointment authority is an exception to the Senate's advise and consent powers. The framers of the Constitution provided for recess appointments in order to allow the President to keep the Government running at a time when Congress was expected to be in recess for many months. Indeed, during the early days of our republic, Congress was in session for less than half the year. Nonetheless, the recess appointment authority has been construed by various Attorneys General to include not only the recess between sessions but the brief recesses within a session. Acting under these interpretations, Presidents have made recess appointments during recesses as short as 18 days.

The growing use of recess appointments has raised serious questions about the proper division of constitutional authority between the President and the Senate. Every recess appointment diminishes the constitutional role of the Senate to advise and consent on nominations. On the other hand, the President is the Chief Executive of the executive branch of Government and has a constitutional duty to keep the Government running. There is no clear answer as to whether any particular recess appointment is or is not an abuse of Presidential discretion. In the final analysis, comity between the President and the Senate requires that both exercise a rule of reason—reason on the part of the President in limiting recess appointments to cases of genuine need; reason on the part of the Senate in giving expeditious consideration to Presidential nominations.

The resolution I have introduced is not intended to provide a definitive Senate position on the recess appointment issue in general. Instead, my purpose is to focus on a much narrower issue—recess appointments to the Federal Reserve. For the reasons I have indicated, the Federal Reserve is a unique institution and the implications of a recess appointment raise many serious issues that may not be present in a department or agency under the supervision and policy direction of the President. The President has no supervisory authority over the Federal Reserve other than his appointment authority provided in the Federal Reserve Act. Thus there are no Presidential executive responsibilities that can be frustrated by a delay in filling a Federal Reserve Board vacancy. The key monetary policy decisions of the Federal Reserve are made by its Open Market Committee which consists of the seven members of the Board and 5 of the 12 Reserve Bank presidents. Thus a temporary vacancy on the Board does not generally impair the ability of the Federal Reserve System to discharge its responsibilities.

The resolution I have put forth expresses the sense of the Senate and is, of course, not legally binding on the President. Nonetheless, if adopted, it is a formal expression of the Senate's views on the use of recess appointments in a particularly sensitive agency, the Federal Reserve. A similar

sense of the Senate resolution was passed in 1960 concerning recess appointments to the Supreme Court. Like the Federal Reserve, concern was expressed that a sitting Justice was placed in a most difficult position since he or she participated in judicial decisions but without the protections afforded by the lifetime appointment status of the other Justices.

Under the language of the resolution, a President is urged to limit recess appointments to the Federal Reserve Board to unusual circumstances and only for the purpose of fulfilling a demonstrable and urgent need in the administration of the Board's activities. In other words, there must be evidence that the Board is having great difficulty in meeting its monetary policy responsibilities given one or more vacancies on the Board. The mere fact of a vacancy does not by itself give rise to an emergency that would justify a recess appointment.

The resolution also expresses the sense of the Senate that nominations to the Board should be considered expeditiously. This in no way impairs the right of one or more Senators, acting under the rules of the Senate, to attempt to defeat any nomination to the Board. It does imply that Presidents have a right to expect there will not be unreasonable delays in scheduling hearings, committee markups, or floor debates.

Mr. President, several Senators have asked me whether this resolution extends to the President's appointment of a Federal Reserve Board Chairman. Because of the unique status of the Federal Reserve, some clarification is in order. The President has the authority under section 10 of the Federal Reserve Act to appoint the seven members of the Federal Reserve Board by and with the advice and consent of the Senate. In addition, he has the authority to designate one of the seven Governors to serve as Chairman for a 4-year term. Beginning in 1979, the Congress subjected this power to designate the Chairman to the advice and consent of the Senate. On the other hand, the President's recess appointment authority under the Constitution only refers to his power to fill vacancies and not to designate the status of officials already appointed. Thus, if a Fed Chairman's term expires as Chairman or if he resigns from the Board, and if a President wished to designate one of the remaining members of the Board as Chairman, he would have to submit the designation to the Senate for its advice and consent in the normal manner. There is no authority under the Constitution for a recess "designation."

Mr. President, this resolution is needed to defend the advice and consent responsibilities of the Senate under the Constitution and to preserve the independence of the Federal Reserve. It is not intended as an adverse reflection on any recess appointee to the Board. Instead, it looks to the future and advises the President as to the Senate's concern that recess appointments to the Federal Reserve Board not be made except under unusual circumstances and only for the purpose of fulfilling a demonstrable and urgent need in the administration of the Board's activities.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 194) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, is as follows:

S. RES. 194

Whereas Article I, Section 8 of the Constitution of the United States assigns exclusively to the Congress the power to "coin money and regulate the value thereof";

Whereas in 1913 the Congress in the Federal Reserve Act delegated its monetary powers to the Federal Reserve System and provided for a 7 member Board of Governors to be appointed by the President, by and with the advice and consent of the Senate;

Whereas the Board of Governors exercises the Federal Reserve System's monetary powers in conjunction with the presidents of the 12 regional Federal Reserve Banks but independent of the executive branch;

Whereas the Congress provided for fixed 14-year terms of service for members of the Board of Governors of the Federal Reserve System in order to maintain the independence of the Federal Reserve System;

Whereas a recess appointment to the Board of Governors of the Federal Reserve System allows an appointee temporarily to participate in the decisions of the Board without the protections afforded by a fixed term since the appointment can be withdrawn at any time until it is confirmed by the Senate;

Whereas a recess appointment to the Board of Governors of the Federal Reserve System could afford a President indirect influence over the conduct of monetary policy inconsistent with an independent Federal Reserve System as provided for in the Federal Reserve Act and the exclusive assignment of monetary powers to the Congress under the Constitution of the United States; and

Whereas the President is nonetheless entitled to expeditious consideration by the Senate of his or her nominations to the Board of Governors of the Federal Reserve System: Now, therefore, be it

Resolved, That it is the sense of the Senate that (1) recess appointments should not be made to the Board of Governors of the Federal Reserve System except under unusual circumstances and only for the purpose of fulfilling a demonstrable and urgent need in the administration of the Board's activities, and (2) nominations to the Board of Governors of the Federal Reserve System should be expeditiously considered by the Senate.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. DOLE. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

RECORD OPEN UNTIL 5 P.M. TODAY

Mr. DOLE. Mr. President, I ask unanimous consent that the RECORD remain open until the hour of 5 p.m. today for the introduction of bills, resolutions, the submission of statements and for committees to file reports.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. DOLE. Mr. President, I am going to suggest the absence of a quorum to permit the staff to check to see if certain nominees are on the Executive Calendar, which ones are being disposed of and which ones are being held. I will indicate that we are not going to hold nominations. When we come back, we are going to start voting on nominations.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. McCLURE. Mr. President, I ask unanimous consent that the order for the quorum call be recinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

LANDSAT AUTHORIZATION ACT OF 1984

Mr. McCLURE. Mr. President, I ask unanimous consent that the Senate now turn to H.R. 2800, Landsat.

The PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (H.R. 2800) to provide authorization of appropriations for activities under the Land Remote-Sensing Commercialization Act of 1984.

The PRESIDING OFFICER. The Senate will proceed to its immediate consideration.

The Senate proceeded to consider the bill.

Mr. McCLURE. Mr. President, I ask unanimous consent that the Senate recede from its amendment and concur in the House bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

ENERGY POLICY AND CONSERVATION ACT AMENDMENTS

Mr. McCLURE. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 1699.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the House disagree to the amendment of the Senate to the bill (H.R. 1699) entitled "An Act to extend title I and part B of title II of the Energy Policy and Conservation Act, and for other purposes", and ask a conference with the Senate on the

c. If a nomination for the office was rejected by the Senate within thirty days prior to the termination of the session, except where the person who receives the recess appointment is the person whose nomination was rejected.

The terminal proviso of 5 U.S.C. 56 requires in addition that a nomination to fill a vacancy in those three contingencies must be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

The statute thus permits the payment of salaries to persons receiving recess appointments to vacancies, which existed while the Senate was in session, in three situations, all of which are predicated on "the termination of the session of the Senate." Here again, the question arises whether this term must be interpreted technically—limited to the final adjournment of a session—or whether it permits the payment of salaries to those who receive a recess appointment after a temporary adjournment of the Senate.

The Comptroller General has ruled that "the term 'termination of the session' [has] * * * been used by the Congress in the sense of *any adjournment*,[14] whether final or not, in contemplation of a recess covering a substantial period of time" (28 Comp. Gen. 30, 37). Considering that the Comptroller General is the officer primarily charged with the administration and enforcement of 5 U.S.C. 56, his interpretation of that statute is of great weight. Independent reexamination of the subject matter, moreover, causes me to concur fully in his conclusions based largely on the purposes which the act of July 11, 1940, 54 Stat. 751, amending 5 U.S.C. 56, was designed to accomplish.

Prior to the enactment of the 1940 amendment, 5 U.S.C. 56 provided that if a vacancy existed while the Senate was in session a person receiving a recess appointment to fill that vacancy could not be paid from the Treasury until he had been confirmed by the Senate. This statute caused serious hardship, especially when a vacancy occurred shortly before the Senate adjourned, or where a session terminated before the Senate had acted on nominations pending before it (H.

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a nomination for this office was pending before the Senate, except where the person who receives the recess appointment is a person appointed during the preceding recess of the Senate.

[14] Emphasis supplied.

Rept. 2646, 76th Cong., 3d sess.; see also letter from Attorney General Murphy to Senator Ashurst, dated July 14, 1939, S. Rept. 1079, 76th Cong., 1st sess., p. 2). The inability to pay recess appointees in those circumstances had the effect of either compelling the President to leave the vacancy unfilled until the next session of the Senate, or causing the appointee to undergo the financial sacrifice of having to serve, possibly for a considerable period of time, without knowing whether he could be paid (see letter of Attorney General Murphy to Senator Ashurst, *supra*).

The purpose of the 1940 amendment was "to render the existing prohibition on the payment of salaries more flexible" (H. Rept. 2646, 76th Cong., 3d sess., p. 1) and to alleviate the "serious injustice" caused by the law as it then stood (S. Rept. 1079, 76th Cong., 1st sess., p. 2). Thus, 5 U.S.C. 56, as it stands now, is a remedial statute designed to permit the immediate payment of recess appointees, provided the President complies in good faith with the statutory conditions.[15]

The "serious injustice" caused by the inability to pay a recess appointee, of course, is just as great and undesirable in the case where the appointment was made after a temporary recess of the Senate as where the commission had been granted after a final adjournment. To restrict the words "termination of the session" to a final adjournment, therefore, would be "inconsistent with the obvious purpose of the law" 28 Comp. Gen. 30, 37.

It follows that a person receiving a recess appointment during a prolonged adjournment of the Senate may be paid, if the conditions of 5 U.S.C. 56 initially have been met, i.e., if the vacancy arose within thirty days of the adjournment; or if a nomination was pending before the Senate at the time of the adjournment, except where the recess appointee has served under an earlier recess appointment; [16] or if the Senate had rejected a nomination within thirty days prior to its adjournment, except where the recess appointee is the person whose nomination had been rejected.

The recess appointee's right to be paid will continue throughout the constitutional term of his office, except for two contingencies: First, if the Senate should vote not to confirm

[15] For that reason, the Comptroller General consistently has interpreted the statute liberally; see, *e.g.*, 28 Comp. Gen. 30, 36–37; 238, 240–241; 36 Comp. Gen. 444, 446.

[16] Cf. n. 13, *supra*.